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A TREATISE
ON THE
EFFECT OF THE
CONTRACT OF SALE

Burn, C. & Blackburn

A TREATISE
ON THE
EFFECT OF THE
CONTRACT OF SALE

ON THE
LEGAL RIGHTS OF PROPERTY AND POSSESSION
IN
GOODS, WARES AND MERCHANDISE.

BY
LORD BLACKBURN.

THIRD EDITION

BY
WILLIAM NORMAN RAE BURN, M.A., LL.B. (GLAS.),
AND
LEONARD CHARLES THOMAS.

WITH
CANADIAN NOTES

BY
HONORABLE MR. JUSTICE RUSSELL,
Of the Supreme Court of Nova Scotia.

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PREFACE TO CANADIAN NOTES

An endeavour has been made to include in the Canadian Notes a statement of the point decided in every important case to be found in the reports and wherever the point raised has been one of special importance or difficulty, an outline of the reasoning has been given. Several cases have been omitted in which the point raised has been merely the application of a well recognized principle to circumstances of no special complexity, but the annotator is pretty confident that no case decided in any court in Canada has been omitted which is not of a negligible character.

B. R.

May, 1910.



PREFACE TO THE THIRD EDITION.

SINCE the second edition of this work was published, the Sale of Goods Act, 1893, has come into operation, the provisions of which statute were to a considerable extent inspired by Lord Blackburn's book. The present edition incorporates those provisions in so far as they are relevant to the topics discussed, but the editors do not pretend, having regard to the scope of the Treatise, to present a detailed examination of the Act; and they have endeavoured to preserve the original design of the book by making the provisions of the Act to a large extent subsidiary to the text.

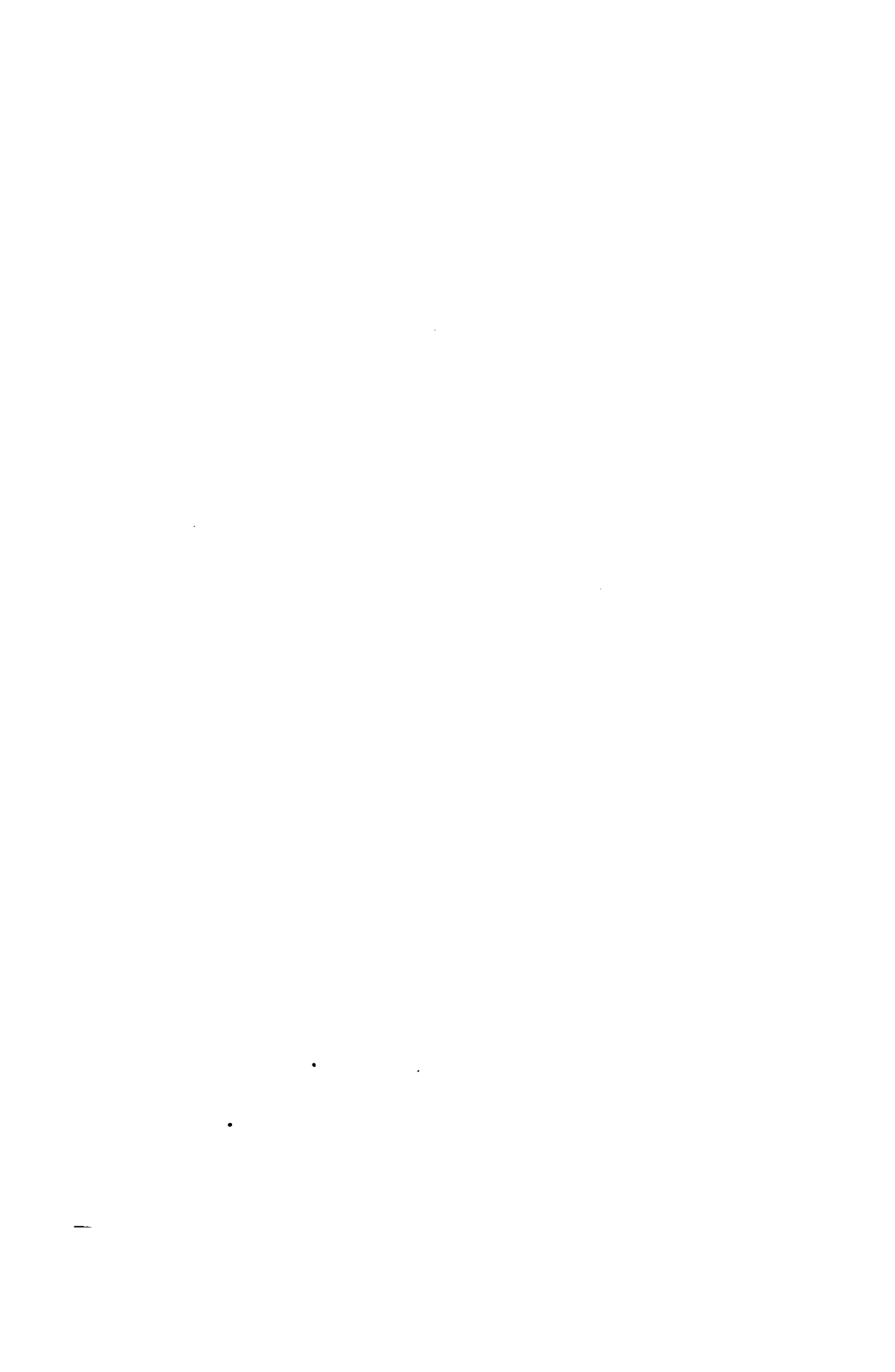
It has been necessary to make various alterations in the text and to add a considerable number of cases, but with these exceptions, together with the qualified enlargement effected by His Honour Judge Graham, K.C., the learned editor of the second edition, viz., the chapters on "Equitable Interests and Assignments," "Damages," and "Interest," this "matchless treatise" (as a learned judge has described it) remains in very much the same form as originally written by Lord Blackburn. The present editors venture to hope that among students and practitioners this edition will be accorded the success achieved by the first and second editions.

W. N. R.

L. C. T.

5, PAPER BUILDINGS,
TEMPLE.

December, 1909.



INTRODUCTION TO THE FIRST EDITION.

It is often of much importance to determine whether a litigant has a legal property in the subject-matter of dispute or merely a right of action against a person. The form of the remedy very frequently depends upon the answer to this question ; for instance, a plaintiff cannot maintain trover or trespass *de bonis asportatis*, unless he has a right to the possession of the goods which are the subject of the action ; neither can a vendor of goods maintain an action for goods bargained and sold unless the property has been transferred to the purchaser. And not only may the technical forms of action depend upon this, but sometimes the substantial question itself turns upon it ; if property is destroyed either by pure accident or by the wrongful act of a party who is unable to pay for it, the loss in general falls upon the owner of the property ; and in cases of insolvency, a creditor who has a legal or equitable right to a thing has the full benefit of it, whilst one whose claim is only against the person of the debtor, can obtain no more than a proportion of the insolvent estate along with the other creditors. In such cases, therefore, it is commonly one of the most important inquiries whether the creditor has any right to some specific property or not.

It is the object of the following Treatise to investigate one branch of this important subject, viz., how the legal interest in moveable corporeal property is affected by a sale of it.

Railway shares, stock, &c., and those kinds of property

that are not tangible are of a different nature, and so is the property in the materials on which contracts or documents of title are written, which, in general, is considered as attached to the writing on them. And the law regulating the property in ships in some degree differs from that affecting other moveable property, but as the law respecting them has been treated of by Lord Tenterden, in his Treatise on Shipping, it is not intended to touch upon that subject.

But subject to these exceptions, the law is the same as regards all moveable property, whether it be live stock or dead, manufactured goods or raw material—in short, of everything capable of touch and not fixed to the soil. The object of this Treatise, as already stated, is to discuss how far the property in goods is, by the law of England, affected by an agreement concerning the sale of them.

By the common law of England, no peculiar form is required to give validity to a contract or agreement. It is essential that there be a mutual assent of both parties as to what is agreed upon, and also (unless the agreement be by deed) that there be a consideration for the engagement of the parties, for if not, the agreement is merely honorary and not enforced by the law ; but if these essential circumstances can be shown to exist the common law is satisfied. The agreement might, at common law, be enforced, if the mutual assent of the parties and the consideration could be proved by any evidence. But by statute law, no contract for the sale of any goods, wares, or merchandize for the price of 10*l.* or upwards shall be allowed to be good except there be evidence of a particular character. When this evidence exists the effect of the agreement is the same as it would have been at common law.

A contract concerning the sale of goods may be defined to be a mutual agreement between the owner of goods and another, that the property in the goods shall for some price or consideration be transferred to the other, at such a time

and in such a manner as is then agreed. If the consideration to be given for the goods is not money, it might perhaps, in popular language, rather be called barter than sale, but the legal effect is the same in both cases.

Such an agreement may have different effects in law upon the ownership of the goods to which it relates. It may be an agreement perfectly binding on the parties so as to give either of them a remedy against the person and general estate of the other for any default in fulfilling his part of the agreement, but having no effect on the property or right of possession in the goods, and giving the proposed purchaser neither the rights nor the liabilities of the proprietor; so that he has no preferable right to the goods themselves, nor any means of enforcing his demand against them more than any other creditor, and on the other hand he is not liable to any loss arising from the destruction or injury of the goods.

Such agreements are generally called "Executory Agreements."

Or it may be an agreement amounting to a bargain and sale of the goods, transferring to the purchaser the general property in the goods, and with it the rights and liabilities attached to property, so that the purchaser has a specific interest in the goods themselves, of which he may avail himself, independently of his remedy against the vendor on the contract, and on the other hand making him liable to the general risk of any loss befalling the goods. Such an agreement is sometimes called an executed sale, but it is more technically called "a bargain and sale" of the goods. When goods are bargained and sold, the vendor, if unpaid, still retains certain rights over the goods until they are delivered.

Such being the outline of the law, there are different points which it will be convenient to treat of separately, viz. :—

1st, What is required to satisfy the provisions of the statute law, and render an agreement concerning the sale of goods capable of being enforced.

2ndly, What agreements amount to a bargain and sale, and what are but executory.

3rdly, What are the rights reserved to a vendor when the general property is transferred to the purchaser, but before it is delivered into his possession.

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A TREATISE

ON THE

CONTRACT OF SALE.

PART I.

THE FOURTH SECTION OF THE SALE OF GOODS ACT.

CHAPTER I.

WHAT AGREEMENTS ARE WITHIN IT.

THE 17th section of 29 Car. 2, c. 3, made for the prevention of frauds and perjuries, commonly called the Statute of Frauds, was in the following words:—"And be it enacted, "that from and after the said four-and-twentieth day of "June (A.D. 1677) no contract for the sale of any goods, "wares, or merchandizes, for the price of 10*l.* or upwards, "shall be allowed to be good, except the buyer shall accept "part of the goods so sold, and actually receive the same, "or give something in earnest to bind the bargain, or in "part payment, or that some note or memorandum in writing "of the said bargain be made and signed by the parties to "be charged by such contract, or their agents thereunto "lawfully authorized" (a).

(a) The fourth section enacted "That no action shall be brought to charge any "executor or administrator upon any special promise to answer damages out of "his own estate; or whereby to charge the defendant upon any special promise "to answer for the debt, default, or miscarriage of another person; or to charge "any person upon any agreement made upon consideration of marriage; or "upon any contract or sale of lands, tenements or hereditaments, or any

The 4th section of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which repealed and in substance re-enacted the 17th section of the Statute of Frauds, provides as follows :—

“(1.) A contract for the sale of any goods of the value of “10*l.* or upwards shall not be enforceable by action unless “the buyer shall accept part of the goods so sold, and actually “receive the same, or give something in earnest to bind the “contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the “party to be charged or his agent in that behalf.

“(2.) The provisions of this section apply to every such “contract, notwithstanding that the goods may be intended to “be delivered at some future time, or may not at the time of “such contract be actually made, procured, or provided, or fit “or ready for delivery, or some act may be requisite for the “making or completing thereof, or rendering the same fit for “delivery.

“(3.) There is an acceptance of goods within the meaning of “this section when the buyer does any act in relation to the “goods which recognises a pre-existing contract of sale “whether there be an acceptance in performance of the “contract or not.

“(4.) The provisions of this section do not apply to “Scotland.”

The Sale of Goods Act, 1893, was a codifying statute, which, except in a few points to be hereafter noted, made no alteration in the existing law, but merely gave it a final and definitive expression. That being so, decisions prior to the Act are still of value as indicating and illustrating the principles upon which the codification proceeded, and as explaining the application of the various sections of the Act.

Lord Blackburn, in the case of *Maddison v. Alderson* (a), in

“interest in or concerning them; or upon any agreement that is not to be per-
“formed within the space of one year from the making thereof; unless the
“agreement upon which such action shall be brought, or some memorandum or
“note thereof, shall be in writing, and signed by the party to be charged
“therewith, or some other person thereunto by him lawfully authorized.”

(a) *Maddison v. Alderson*, 52 L. J. Q. B. 749; 8 Ap. Ca. 488. See also the

1883, said, "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract" (a).

This important section is applicable to every sale of tangible moveable property, though not to sales of shares in a company or other intangible property (b).

At one time a question arose under the 17th section of the Statute of Frauds as to whether public sales by auction were not excepted from its operation. Conflicting opinions were expressed by Lord Mansfield in *Simon v. Motivos* (c) and Lord Ellenborough in *Hinde v. Whitehouse* (d), but the point was finally decided in the case of *Kenworthy v. Schofield* (e) in 1824. In that case there was a sale by auction of goods above 10*l.* in value, and the requisites of the statute were not complied with. The King's Bench decided that the contract could not be enforced; this decision has always been acted upon (f).

It was an unsettled point whether the provisions of the Statute of Frauds were applicable to contracts for the sale of goods which were at the time of the contract not in a state capable of being delivered according to the provisions of the contract: more recent statutes have rendered the point no longer important, but it may be worth while to state the difficulty.

In *Towers v. Osborne* (g), in 1724, Pratt, C. J., decided

judgment of Brett, L. J., in *Britain v. Rossiter*, in 1879, 48 L. J. Q. B. 363; 11 Q. B. D. 127.

(a) An agreement made verbally abroad, and good there, cannot be enforced here if it fails to conform with the Sale of Goods Act, *Leroux v. Brown*, 22 L. J. C. P. 1; 12 C. B. 801, in 1852. But very considerable doubt was thrown on this case by Willes, J., in *Williams v. Wheeler*, 8 C. B. N. S. 299, in 1860.

(b) *Humble v. Mitchell*, 11 A. & E. 205.

(c) *Simon v. Motivos*, 1 W. Bl. 599; S. C. 3 Burr. 1921.

(d) *Hinde v. Whitehouse*, 7 East, 558.

(e) *Kenworthy v. Schofield*, 2 B. & C. 945.

(f) See also *Peirce v. Corf* (1874), 43 L. J. Q. B. 52; L. R. 9 Q. B. 210.

(g) *Towers v. Osborne*, 1 Strange, 506.

that an agreement to make a chariot was not within the statute, which he said related only to contracts in which the seller was to deliver the goods immediately.

In *Clayton v. Andrews* (a), in 1767, the King's Bench confirmed this case, and held that a contract to deliver wheat (then unthrashed) in a month from the time of the agreement was not within the statute.

In *Groves v. Buck* (b), in 1814, the King's Bench decided that an agreement to purchase a quantity of oak pins, not yet cut out of the slab, was not within the statute.

The principle of these cases, decided by great Judges, including Pratt, C. J., Lord Mansfield, and Lord Ellenborough, seems to have been either that the word "bargain" in the statute must be taken in the strict technical sense, so as to exclude all executory contracts not amounting to a "bargain and sale," or else that, as the statute said the contract was to be good if the buyer "accepted and actually received" part of the goods, it could only be meant to apply to contracts where it was possible to accept and receive part of the goods. It is clear that the buyer could neither accept nor receive the chariot before it was built, the corn before it was thrashed, or the oak pins before they were cut out.

On the other hand, in *Rondeau v. Wyatt* (c), in 1792, the Court of Common Pleas decided, after taking time to consider, that a contract to supply goods on board ship was within the statute, as it was a contract for a sale, though a future one; and in *Garbutt v. Watson* (d), in 1822, the King's Bench decided the same point where the goods were flour yet unground. In both these cases the Court said that *Towers v. Osborne* (e) might, perhaps, be supported as being a contract, not for a sale, but for work, labour, and materials; but subsequently in *Atkinson v. Bell* (f), the King's Bench held that

(a) *Clayton v. Andrews*, 4 Burr. 2101.

(b) *Groves v. Buck*, 3 M. & S. 178.

(c) *Rondeau v. Wyatt*, 2 H. Bl. 63.

(d) *Garbutt v. Watson*, 5 B. & A. 613.

(e) *Towers v. Osborne*, 1 Strange, 506.

(f) *Atkinson v. Bell*, 8 B. & C. 277.

it was not so. In *Garbutt v. Watson* (a), *Clayton v. Andrews* (b) was expressly overruled.

It seems impossible to reconcile these decisions, but the legislature in 1828, by 9 Geo. 4, c. 14, s. 7 (Lord Tenterden's Act), put an end to the difficulty by enacting, that the provisions of the Statute of Frauds should apply to agreements to sell as well as to [bargains and] sales, and the 7th section of Lord Tenterden's Act is substantially incorporated in section 4 (2) of the Sale of Goods Act.

In *Harman v. Reeve* (c), in 1856, Jervis, C. J., pointed out that in 9 Geo. 4 the word "value" was used, instead of the word "price," as in the 17th section, and that as the statutes must be construed together, the 17th section must be read as if it contained the word "value," and this distinction is maintained in section 4 (1) of the Sale of Goods Act.

The Sale of Goods Act (section 62) defines "goods" as including all chattels personal other than things in action and money (and in Scotland all corporeal moveables except money), emblements (industrial growing crops) and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Prior to the Sale of Goods Act the question frequently arose whether a contract for the sale of *fructus naturales*, as distinct from *fructus industriales* or emblements, was within the 17th section of the Statute of Frauds.

It seems pretty plain, upon principle, that an agreement to transfer the property in something that is attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods before the property is to be transferred, is an agreement for the sale of goods within the meaning of the 9 Geo. 4, c. 14, if not of the 29 Car. 2, c. 3. The agreement is, that the thing shall be rendered into goods and then in that state sold; it is an executory agreement for the sale of goods, not existing in that capacity at the time of the contract. And when the agreement is, that the property

(a) *Garbutt v. Watson*, 5 B. & A. 613.

(b) *Clayton v. Andrews*, 4 Burr. 2101.

(c) *Harman v. Reeve*, 25 L. J. C. P. 257; 18 C. B. 587.

is to be transferred before the thing is severed, it seems clear enough, that it is *not* a contract for the sale of goods, it is a contract for a sale, but the thing to be sold is not goods. If this be the principle, the true subject of inquiry in each case is, when do the parties intend that the property is to pass? if the things perish by inevitable accident before the severance, whom do they mean to bear the loss? for in general that is a good test of whether they intend the property to pass or not; in other words, if the contract be for the sale of the things after they have been severed from the land so as to become the subject of larceny at common law, it is, at least, since the 9 Geo. 4, c. 14, a contract for the sale of goods, wares, and merchandizes, within the 17th section of the Statute of Frauds. If the contract be for the sale of the things whilst they are attached to the soil and not the subject of larceny at common law, it is a contract for the sale of things, crops, fixtures, emblements, trees or minerals, which may or may not be an interest in land within the 4th section of the statute, but are not goods, wares, and merchandizes within the 17th section. But the Sale of Goods Act appears to have altered the law to this extent, that so long as the contract provides for the severance from the soil of the thing sold, even though it is the buyer who is to effect the severance, or the property has passed before severance, it is a contract for the sale of goods (a). But in *Lavery v. Pursell* (b), in 1888, Chitty, J., held that a sale of the building materials of a house, to be taken down and cleared off the ground by the buyer within two months, was within the 4th section of the Statute of Frauds. In *Lee v. Gaskell* (c), in 1876, a contract for the sale of unsevered tenant's fixtures was held to be within neither the 4th section nor the 17th section of the Statute of Frauds, but if the fixtures were sold for the purpose of being removed, it is submitted that such a contract would be within the Sale of Goods Act. In *Morgan v.*

(a) *Marshall v. Green* (1876), 40 L. J. C. P. 153; 1 O. P. D. 35.

(b) *Lavery v. Pursell*, 57 L. J. Ch. 570; 39 Ch. D. 508.

(c) *Lee v. Gaskell*, 45 L. J. Q. B. 540; 1 Q. B. D. 700.

Russell & Sons (a), in 1908, it was held that an agreement whereby the seller sold to the buyers certain slag and cinders which had, as it was found by the Court, become part of the soil of premises of which the seller was the lessee, was not a contract for the sale of goods, but a contract to grant an interest in land.

In reviewing the authorities under the older statutes, it is of some importance to remark how the question arose before the Court, and whether the decision turned upon the legal effect of the contract proved in evidence, or upon the contract stated in the pleadings, for some misapprehensions seem to have arisen from neglecting this.

The first case that is generally cited on the subject was *Waddington v. Bristow (b)*, decided by the Common Pleas in 1801. It was an action against executors. The declaration was that the defendant's testator was possessed of land on which hops were then growing; that the plaintiffs bargained for and agreed to buy, and the testator agreed to sell all the hops *then growing*, to be delivered in pockets, &c. In proof of this declaration a document was produced, signed by both parties, which was in the following terms:—"Agreed to give "the undermentioned gentlemen at the rate of 10*l.* per cwt. "for the quantities of hops as attached to their respective "names, to be in pockets, and to be delivered at Whitstable.— "Wm. Francis (the testator), about 23 acres." This paper was not stamped, and the question was not whether it came within the Statute of Frauds or not, but whether it came within the exemption in the Stamp Act of agreements relating to the sale of goods, wares, and merchandizes. Lord Alvanley thought it an agreement for the sale of goods, and something more, viz., an agreement not to sell the produce of the land to any one else before it was severed. Heath, J., and Rooke, J., thought a contract for the sale of non-existing goods was not within the exemption, and that as in this case the hops did not at the time of the sale exist as goods, it required a stamp. Chambre, J., thought a contract for the sale of non-existing

(a) *Morgan v. Russell & Sons*, [1909] 1 K. B. 357.

(b) *Waddington v. Bristow*, 2 B. & P. 452.

goods was within the exemption ; he seems to have doubted whether the agreement proved was not within the exemption, but he agreed with Lord Alvanley that the agreement declared upon gave the purchaser an interest in the produce of the vendor's land. It seems probable that Chambre, J., would have held the agreement declared on within the 4th section of the Statute of Frauds, but it seems difficult to treat this case as directly deciding anything, and Parke, B., in *Rodwell v. Phillips* (a), threw doubt on it.

In *Crosby v. Wadsworth* (b), in 1805, the action was trespass to the plaintiff's close, growing grass and hay. The plaintiff claimed the hay under a parol contract ; Lord Ellenborough expressed an opinion that it could not be an agreement within the 17th section, because the goods did not exist as such at the time of the contract ; on this opinion he afterwards acted in *Groves v. Buck* (c), but whatever it might be then, it was no longer law after Lord Tenterden's Act. But the judgment of the Court was that an agreement conferring an exclusive right to the growing grass was an agreement for an interest in land. It may be observed that on these pleadings the effect of the agreement was not material ; if the agreement did not give an exclusive right to the growing grass, trespass would not lie ; if it did, the statute applied : in either case the plaintiff failed (d).

In *Scorell v. Boxall* (e), in 1827, on similar pleadings, the Exchequer decided the same point the same way, where the subject-matter of the action was growing underwood.

In both those cases the Court had to decide upon the contract as it was stated on the pleadings ; but in many cases the question depended on the legal effect of the contract proved, and it became necessary to inquire into the state in which the subject-matter of the sale was, or would be, at the time when the property was intended to pass. In general,

(a) *Rodwell v. Phillips*, 9 M. & W. 503.

(b) *Crosby v. Wadsworth*, 6 East, 602.

(c) *Groves v. Buck*, 3 M. & S. 178.

(d) *Carrington v. Roots*, in 1837, 2 M. & W. 248.

(e) *Scorell v. Boxall*, 1 Y. & J. 396.

when there was a contract for the sale of goods in a state not yet fit for delivery, it was considered that the property was not intended to be transferred to the purchaser until the seller had done all that he was bound to do to render the goods fit for delivery, unless a contrary intention clearly appeared (*post*, page 184), and this rule applied where the contract was for the sale of things not yet rendered into goods, but which were, if the agreement was pursued, to be rendered into goods. And now, by the Sale of Goods Act, 1893, s. 4 (2), the provisions of the section apply notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery. The intention of the parties must be presumed to be to transfer the property in the things when in a deliverable state, *i.e.*, when severed from the soil, if that was to be done by the seller, and not before. There is no doubt on the authorities that such a contract, continuing executory till the subject-matter of the sale was converted into goods, was a contract concerning the sale of goods, and not a contract for the sale of an interest in land.

Thus, in *Smith v. Surman* (a), in 1829, the King's Bench held that a verbal agreement for the sale of timber then growing, and to be cut by the seller, was a contract for the sale of goods within the meaning of the 17th section. Little Dale, J., said, in delivering judgment, "The impression
"on my mind is that wherever the subject-matter at the
"time of the completion of the contract is goods, wares, and
"merchandizes, the 17th section attaches upon it, although
"it has become goods, wares, and merchandizes between the
"time of making and completing the contract, either by one
"of the parties having bestowed his work and labour upon
"his own materials, or by his having converted a portion of
"his freehold into goods and chattels." In that case the

(a) *Smith v. Surman*, 9 B. & C. 561. See also *Teal v. Auty*, 2 Brod. & B. 101.

timber was to be cut by the *sellers*. In *Watts v. Friend* (a), in 1830, the plaintiff agreed to supply the defendant with turnip seed: the defendant was to sow it on his own land, and to sell the seed produced to the plaintiff at a guinea a bushel. There turned out to be more than 10*l.* worth of seed. The King's Bench held that this contract was within the 17th section. In *Sainsbury v. Matthews* (b), in 1838, the Exchequer held that a contract for the sale of potatoes not yet at maturity, at so much per sack, to be dug by the buyer, was not a contract passing any immediate interest at all, but a contract for the sale of goods at a future day. Parke, B., said, "The contract gives no right to the land; if "a tempest had destroyed the crop in the meantime, and "there had been none to deliver, the loss would clearly have "fallen upon the defendant" (the seller). "It is only a "contract for goods to be sold and delivered." The contract was for the sale of things which were not goods at the time of the contract, but were to be made so before the contract attached upon them and the property passed. The terms of the agreement by which the price was to depend on the number of sacks seem to be in this case important, and to make the distinction between it and the following cases:—

In *Parker v. Staniland* (c), in 1809, the bargain was for the crop of potatoes in the ground in November, and the buyer was to take them immediately; instead of taking them immediately, he dug and removed them at intervals, taking the last about Lady Day, by which time they were damaged by the frost. The buyer paid for all the potatoes he had taken away, but refused to dig up or take away the potatoes in a part of the field where they were destroyed by frost. The seller recovered a verdict for their price. No question could arise upon the 17th section, for there was both a part payment and a part acceptance and receipt, but a rule nisi for a non-suit was granted on the ground that the bargain was for an interest in land; no point seems to have

(a) *Watts v. Friend*, 10 B. & C. 446.

(b) *Sainsbury v. Matthews*, 4 M. & W. 343; 7 Dowl. 23.

(c) *Parker v. Staniland*, 11 East, 365.

been made about the risk of loss, perhaps because it was considered a clear thing that the damage arose from the gross negligence of the buyer, who should have dug the potatoes up before the winter. An objection to the form of action, which would probably have raised the same point in another shape, was overruled, because not taken at the trial. But though the fact of the point not being made may weaken the authority of the case, it seems that Lord Ellenborough did consider that the contract gave the buyer property in the potatoes whilst yet unsevered from the soil, and that a property in them was not an interest in land, "though," said he, "they were not in the shape of personal chattels, "as not being severed from the land, so that larceny might "be committed of them."

In the very same week, June 6th, 1809, the Common Pleas, in *Emmerson v. Heelis* (a), decided the reverse. In that case there was a sale by auction of a growing crop of turnips, to be dug by the buyer, for a price less than 10*l.*, so that no question could arise upon the 17th section. There seems to have been no express agreement as to when they were to be removed, but in other respects the contract seems identical with that in *Parker v. Staniland* (b). The seller brought an action against the buyer for not taking these turnips away. On behalf of the defendant several objections were made, which were satisfactorily answered; but a great one was, that it was a contract for an interest in land, and that the only memorandum was that made by the auctioneer at the sale, and that the signature of the auctioneer would not bind the buyer. The Court, after argument and taking time to consider, decided that it was an interest in land, but that the signature of the auctioneer was binding. From the expressions used, it appears that the Court thought the buyer took an interest in the turnips whilst yet in the soil, and that it never occurred to them that there could be any difference between growing turnips, which are emblements,

(a) *Emmerson v. Heelis*, 2 Taunt. 38.

(b) *Parker v. Staniland*, 11 East, 365.

and hops and growing timber, both of which were instanced by the Court.

In *Rodwell v. Phillips* (a), in 1842, the Exchequer thought that the following agreement: "Thomas Phillips agrees to "sell to Mr. Rodwell the crops of fruit and vegetables of the "upper portion of the garden, from the large pear trees, for "the sum of 30*l.*, and Lionel Rodwell agrees to buy the "same at the aforesaid price, and has paid 1*l.* deposit," gave the buyer an interest in the fruit before severance and was an interest in land, and consequently required a stamp. The buyer was to gather the fruit. Lord Abinger, C. B., pointed out in his judgment that growing fruit would not pass to an executor, but to the heir. The pears, in this case, were neither emblements nor fixtures, but part of the freehold.

The distinction between these cases, in which the property in the things was held to pass before they were severed from the soil, and *Sainsbury v. Matthews* (b), is precisely the same as that between an ordinary [bargain and] sale, and the case of *Simmons v. Swift* (c).

As the parties might enter in fact into a contract giving an interest in crops whilst still unsevered, it was desirable to inquire whether such a contract was within either the 4th or 17th sections of the Statute of Frauds, and although the doubt, which formerly existed as to whether a sale of emblements before severance constituted a sale of goods or a sale of an interest in land, has now been resolved by section 62 (1) of the Sale of Goods Act, the older decisions on the question are still of interest.

In *Warwick v. Bruce* (d), in 1813, in which the contract declared on was a contract for the sale of all the potatoes *then* growing on certain lands, Lord Ellenborough overruled an objection that the contract was within the 4th section of the Statute of Frauds. "If," said he, "this had been a contract "conferring an exclusive right to the land for a time, for the

(a) *Rodwell v. Phillips*, 9 M. & W. 501.

(b) *Sainsbury v. Matthews*, 4 M. & W. 343 ; 7 Dowl. 23.

(c) *Simmons v. Swift*, 5 B. & C. 857.

(d) *Warwick v. Bruce*, 2 M. & S. 205.

“purpose of making a profit of its growing surface, it would
“be a contract for the sale of an interest in land. But here
“it is a contract for the sale of potatoes at so much an acre.
“The potatoes are the subject-matter of sale, and whether at
“the time of the sale they were covered with earth in the
“field or in a box, still it was a sale of a mere chattel.” It
seems pretty clear that Lord Ellenborough thought that
growing crops were not part of the land within the 4th
section, though he certainly never intimates an opinion that
they were goods in any sense of the word before severance.

In *Evans v. Roberts* (a), in 1826, the agreement was for
the sale of a cover of potatoes, to be turned up by the seller
at the price of 5*l*. No question would arise under the 17th
section, as the price was below 10*l*. ; but it was objected that
it was a contract for the sale of an interest in land. Holroyd,
J., pointed out that the buyer was to have nothing to do
with the potatoes till they were raised ; and, moreover, that
the seller might choose which cover the buyer was to
have, so that he could have no interest in any specific land ;
but though both these propositions seem pretty clear, and
either of them would have disposed of the case, Bayley, J.,
and Littledale, J., took the opportunity of giving their
opinions on the law at some length. Bayley, J., held that
emblements and fixtures were not land within the 4th section,
and expressly dissented from the opinion in *Emmerson v.*
Heelis (b), which he treated as a dictum not necessary for
the decision of the case (c). Littledale, J., at some length
gave an opinion that land in the 4th section “meant land
“taken as mere land, and not its annual growing productions.”
This opinion is in accordance with what appears to have been
Lord Ellenborough’s ; but Bayley, J., went further, and
stated that growing crops were mere goods, and might be

(a) *Evans v. Roberts*, 5 B. & C. 829.

(b) *Emmerson v. Heelis*, 2 Taunt. 38, ante, p. 11.

(c) This was a misapprehension of the learned judge, as it was a necessary
point to be decided before the point on which the judgment was given could
arise : indeed, the whole of this judgment of Bayley, J., is open to his own
observation ; it was not much considered, for it was unnecessary to the decision
of the case then before the Court.

recovered under a count for goods [bargained and] sold, and he stated less distinctly, that a contract for the sale of them was within the 17th section. These two last propositions seem, however, exceedingly questionable, and no authority is given for either. In *Mayfield v. Wadsley* (a), an outgoing tenant was allowed to keep a verdict on a count for crops [bargained and] sold, which he had obtained against the incoming tenant, who had agreed to take them at a valuation; and in *Hallen v. Runder* (b), in 1834, the Exchequer held that counts for fixtures, [bargained and] sold, were sufficient. But in the latter case it was expressly decided, that an agreement for the sale of fixtures between the landlord and the outgoing tenant was not a sale of *goods*, either within the Statute of Frauds or the meaning of a count for goods sold and delivered (c). It may be observed, that in both these cases the land was to pass to the buyer, and the agreement was rather an abandonment of the seller's right to diminish the value of the land, than a sale of anything; but it seems difficult to make that consistent with the opinion of Bayley, J., in *Evans v. Roberts* (d): if a contract for a sale of crops or fixtures to one who takes the soil is only an abandonment of a right to sever them, it seems to follow that a sale of them in their unsevered state to one who does *not* take the soil, is only a transfer of the right to sever them.

The next case on the subject was *Jones v. Flint* (e), in 1839. There crops were sold by parol, and it was agreed that the seller's cattle should run with the buyer's in the after-grass. There had been part payment. The declaration was for crops bargained, sold and carried away. The Court held, that it was clear that the crops were not an interest in land, and they considered the agreement about the after-grass to amount to an agreement that the buyer's cattle should eat the seller's grass: not that the grass should

(a) *Mayfield v. Wadsley*, 3 B. & C. 357.

(b) *Hallen v. Runder*, 1 C., M. & R. 267.

(c) This case was followed in *Lee v. Gaskell*, in 1876, 45 L. J. Q. B. 540; 1 Q. B. D. 700.

(d) *Evans v. Roberts*, 5 B. & C. 829.

(e) *Jones v. Flint*, 10 A. & E. 754.

become the buyer's and the seller's cattle eat it. They held, therefore, that there was no contract for the sale of an interest in land within the 4th section. No question arose about its being a sale of goods within the 17th section, as the part payment put an end to any objection upon that ground (a).

The next case on the question whether the contract gave an interest in land within the meaning of the 4th section was *Marshall v. Green* (b), in 1875, where most of the authorities were considered, and Brett, J., laid down certain tests based upon Sir E. V. Williams's note to *Duppa v. Mayo*, in the last edition of Williams' Saunders, p. 395. He said, "That note gives certain tests as applicable to particular cases. Where the subject-matter of the contract is growing in the land at the time of the sale, then if by the contract the thing sold is to be delivered at once by the seller the case is not within the section (4th). Another case is where, although the thing may have to remain in the ground some time, it is to be delivered by the seller finally, and the purchaser is to have nothing to do with it until it is severed, and that case also is not within the section. Then there comes the class of cases where the purchaser is to take the thing away himself. In such a case where the things are *fructus industriales*, then, although they are still to derive benefit from the land after the sale in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section. If they are not *fructus industriales*, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in land, and the case is within the section. But if the thing, not being *fructus industriales*, is to be delivered immediately, whether the seller is to deliver it or the buyer

(a) Cf. *Washbourn v. Burrows*, in 1847, 16 L. J. Ex. 266; 1 Ex. 107.

(b) *Marshall v. Green*, 45 L. J. C. P. 153; 1 C. P. D. 35.

“ is to enter and take it himself, then the buyer is to derive
“ no benefit from the land, and consequently the contract is
“ not for an interest in the land, but relates solely to the
“ thing sold itself.”

In *Lavery v. Pursell*, in 1888 (a), the last case on the question, where there was a sale of the building materials of a house, and it was agreed that these were to be taken down and cleared off the ground in two months, it was held that there was a sale within the 4th section of the Statute of Frauds. In that case, *Marshall v. Green* (b) was considered, and distinguished on the ground that the judgment proceeded on the basis that the contract was not for an interest in land, but related solely to the thing sold itself. It is to be observed that the Sale of Goods Act, 1893, s. 62, includes in the definition of “ goods ” “ things attached to or forming part of “ the land which are agreed to be severed before sale or under “ the contract of sale,” and thereby sanctions the conversion, by agreement of the parties, of a hereditament into chattels, which Chitty, J., in *Lavery v. Pursell* (a), declined to accept; and it is submitted that in this respect the Act has made a change in the law.

In the cases in the note (c) the question was whether that which had been contracted for was goods, or work and labour. The importance of this is very much less now than it was when strict forms of pleading were in use.

(a) *Lavery v. Pursell*, 57 L. J. Ch. 570; 39 Ch. D. 508.

(b) *Marshall v. Green*, *ubi sup.*

(c) *Atkinson v. Bell*, in 1828, 8 B. & C. 277; *Grafton v. Armitage*, in 1845, 15 L. J. C. P. 20; 2 C. B. 336; *Clark v. Bulmer*, in 1843, 11 M. & W. 243; *Clay v. Yates*, in 1856, 25 L. J. Ex. 237; 1 H. & N. 73; *Lee v. Griffin*, in 1861, 30 L. J. Q. B. 252; 1 B. & S. 272.

What contracts are within the 17th section of the Statute of Frauds? Growing crops, grass, trees, etc. The earliest Canadian case in which a question was raised as to growing crops is that of *Haydon v. Crawford*, 3 O. S. 583, (1834). In this case Robinson, C.J., after citing the English cases, expressed the opinion that the sale of a crop of corn ready for the harvest was the sale of a mere chattel and did not require a writing to make the alienation of it legal. Macaulay, J., treated it as an open question whether the sale was not within the Statute of Frauds as an interest in land. The question cannot be considered open to doubt in view of the cases cited in the text. The sale of a growing crop, whether the property is to pass before or after severance, is not an agreement for an interest in land, and it is hardly to be doubted that it is within the terms of the statute as a sale of goods, wares or merchandizes. The case of *fructus naturales*, such as trees and grass, has been considered in the cases which follow.

Where the contract relates to growing trees the principle that could be stated with certainty before the decision in *Marshall v. Green*, L.R. 1, C.P.D. 35, was that if the property was to pass after they were severed from the soil they were goods within the meaning of the seventeenth section of the Statute of Frauds, but if the property was to pass before severance from the soil they were an interest in land. This was true not only of trees, but, as stated in the text, of grass and fruit on trees, which are called *fructus naturales*. The decision in *Marshall v. Green*, L.R. 1, C.P.D. 35, threw the matter into a state of confusion, which has been partially remedied by the later case of *Lavery v. Purcell*. In the meantime, the Canadian case of *Summers v. Cook*, 28 Grant, Ch., 179, occurred in the Court of Chancery of Ontario. The purchasers agreed to buy all the merchantable white and red pine timber suitable for their purpose standing, lying or being on certain premises owned by the vendor, for the price or sum of six hundred dollars, payable four hundred dollars on date of agreement, and the balance in one year, with a provision that the timber should be cut and removed off the lands on or before a date eight years later than that of the agreement. Blake, V.C., distinguished the case of *Smith v. Surman*, 5 B. & C.

561, as a case in which the sale was of timber when cut down and severed at so much per foot, and was therefore not a contract for lands or any interest therein. Commenting on *Marshall v. Green*, he says: "I think we have in this case an unfortunate extension of the intelligible rule that growing trees are an interest in land, and that a contract in respect of them falls within the same rules as a contract in respect of land, and that it is to be regretted that this question is left to depend upon the length of time the party has to remove the property purchased. But be this as it may, *Marshall v. Green* would have to be almost indefinitely extended if the clause 'the trees to be got away as soon as possible' (which were the words of the agreement in *Marshall v. Green*) be enlarged so as to cover a possible period of eight years." Proudfoot, V.C., who delivered a dissenting opinion, referred to *Marshall v. Green*, L.R. 1, C.P.D. 35, without the disapproval implied in Vice-Chancellor Blake's remarks, and stated the rule deducible from the cases to be that if the trees were purchased for the timber as they stood, and not with the intention of allowing them to increase in size and become more valuable from remaining in the soil, they are to be considered chattels. This was the criterion applied in *Marshall v. Green*, which was acknowledged to be unsatisfactory by Coleridge, C.J., who adopted it. It is certainly not so easy to apply as the principle that the sale of a tree is an agreement concerning an interest in land if it is the intention that the property should pass before severance and an agreement for the sale of goods if the property is not to pass until after severance from the soil.

Sale of the right to cut standing timber in Quebec has no effect on title to land. In *Laurentide Paper Co. v. Alexander Baptiste*, 41 S. C. R. 105, it was held that a deed of sale of the right during twenty years to cut and remove standing timber, with permission to make and construct such roads and buildings as might be necessary for that purpose, did not affect the title to the land on which the trees were growing, but merely conveyed a personal right to the timber as and when cut under the license. The registration of such a deed in conformity with the provisions of

the Civil Code of Lower Canada, respecting the registration of real rights was unnecessary, and if effected could not operate to secure to the vendee any right of priority of title in or to the timber as against a subsequent purchaser of the lands.

The case of *Watkins v. Perkins*, Q. R. 16, K. B. 471, was distinguished by the Chief Justice because in that case the question was as to the rights of the holder of a timber license with respect to timber cut in trespass on limits bought from the Crown, which rights were settled by a special provision of the statute regulating the sale and management of Crown Lands, under which the limits were bought.

Are fixtures an interest in land or goods, wares and merchandise? The case of *Hallen v. Runder*, 1 C. M. & R. 266 (1834), decided that a tenant who had agreed to sell to his landlord at a valuation the fixtures which he had a right to remove at the end of his tenancy could not sue for goods sold and delivered, but could sue for fixtures bargained and sold. They seem to have been put by this case in the category with *fructus industriales*, which even where the property passes before severance are not an interest in land. But the later case of *Lee v. Gaskell*, 1 Q. B. D. 700 (1876), decides that they are not goods, wares and merchandise within the 17th section of the Statute of Frauds. The tenant in this case had become bankrupt, and the trustee in bankruptcy had sold the fixtures to the plaintiff, who sold them to the defendant, the landlord. Cockburn, C.J., said: "Fixtures, although they may be removable during
" the tenancy, as long as they remain unsevered are part
" of the freehold, and you cannot dispose of them to the
" landlord or anyone else as goods and chattels, because
" they are not severed from the freehold so as to become
" goods and chattels." The result of these cases is stated in the headnote to the later case, "that the sale was not
" within section 4 of the Statute of Frauds, as the sale of
" an interest in land, nor within section 17 as the sale of
" goods and chattels."

The Canadian cases on the subject deal for the most part with the question as to the right to take such property under *feri facias*. In *Walton et al. v. Jarvis*, 13 U. C. Q. B.

616 (1856), however, the question was raised as to the application of the Statute of Frauds. An engine and boiler had been in a saw-mill which was burned down and remained there set in bricks and bolted to timbers let into the ground. The sheriff offered them for sale, which was held to be clearly illegal, as they were then fixed to the freehold and could not be taken as chattels. On the return day of the writ the debtor sold them verbally to the plaintiff, who detached them from the mill and removed them to another place. Robinson, C.J., stated the question whether while the things stood there attached to the freehold it was competent to the owner of the fee to make a verbal sale of them or whether the fourth section of the Statute of Frauds would apply, and said: "My personal impression is, that the fourth section of the Statute of Frauds does not apply to anything of this nature affixed to the soil, but deriving no nourishment from it, like trees or grass growing; but the sale of such things so situated would effect nothing more, while they continued attached, than a license to enter upon the land and detach them from it, and as soon as they were detached they became chattels," etc.

There are two cases in the Supreme Court of Canada which raise the question as to the right of the sheriff to seize and sell under *feri facias*, but do not bear directly on the question as to the application of the Statute of Frauds. They are *La Banque d'Hochelaga v. The Watrous Engine Works*, 27 S. C. R. 406 (1897), and *Liscombe Falls Gold Mining Co. v. Bishop*, 35 S. C. R. 539 (1904).

Stamp mill is a chattel, or at least, a trade fixture. Where a licensee of mining areas from the Crown under the Nova Scotia Mining law erects a stamp mill on the wild lands of the Crown for the purpose of testing ores all the various parts of the mill being placed in position resting upon the land by their own weight or steadied by bolts so that the whole installation could be removed without injury to the freehold, the mill is a chattel or, at any rate, a trade fixture, removable by the licensee during his license or lease, and is consequently subject to seizure under execution. *Liscombe Falls v. Bishop*, 35 S. C. R. 539.

Expenses of removing fixtures recoverable by purchaser. In *Wilson et al. v. Mason*, 38 U. C. Q. B. 14, the purchasers had bought two distillery plants, part of which was fixed to the distillery building. In order to obtain possession of this it was found necessary to incur expenses in removing the part so affixed. Plaintiffs were held entitled to recover the amount so expended as money paid.

Contract to furnish a tombstone and put it up at a grave is a sale of goods. This was decided in *Wolfenden et al v. Wilson*, 33 U. C. Q. B. 442 (1873), on the authority of *Lee v Griffin*, Robinson, C.J., saying: "The fact that the seller " may have agreed to place it in a particular graveyard or " particular part of the cemetery would not make it any " the less a chattel. The sale of a pump would be the sale " of a chattel, though the seller had agreed to place it in " position on the grounds of the purchaser. The purchase " of a steam engine would be the purchase of a chattel, " though the seller might agree to fit it up."

Sale by a sheriff or his bailiff is within the Statute of Frauds. In *Flintoft v. Elmore*, 18 U. C. C. P. 274 (1868), Richards, C.J., said: " If a sale by an auctioneer comes with- " in the section, I do not see any good reason for holding " that the sale by the sheriff should not; the reason for the " statute applying would hold good as much in one case " as the other. If the sheriff is allowed to sue for the price " of goods sold by him, he and his bailiff have as much " interest in a sale as an auctioneer has when he sells and " has to sue in his own name. I see no good reason for " creating a distinction between the two kinds of sale." The point had been decided in the same way in the Common Pleas in *Mingaye v. Corbett*, 14 U. C. C. P. 557 (1864), in which it was held that " a sale of goods and chattels by a " sheriff under a writ of execution comes within the 17th " section of the Statute of Frauds and requires a memoran- " dum in writing or a delivery of the goods sold to bind the " sale."

Is an agreement by insolvent purchaser after property has passed to hold goods for vendor within the statute? A difficult question arose in the case of *Brassert v. McEwen*,

10 O. R. 179, in which goods were sold by the plaintiff to McClung, Briggs & Co., in Toronto. Before the notice was given which would stop the goods *in transitu*, the purchasers had paid the freight and duty and removed the goods to their own warehouse. But negotiations took place between the plaintiff and the purchasers which resulted in a verbal agreement by the latter to hold the goods subject to the plaintiff's orders, and the purchasers on a later day wrote plaintiffs' agent to the same effect. The question arose whether this agreement was within the Statute of Frauds. Cameron, C.J., seems to have held that it was, and this is apparently the decision of the court, but the learned Chief Justice says: "In arriving at this conclusion "I cannot say that my mind has been free from doubt as "to whether the transaction is within the 17th section of "the statute or not. As a resale it would clearly be so. "But, though clearly the goods were in possession of McClung, Briggs & Co., it does not seem so plain that parties "situated as the plaintiff and McClung, Briggs & Co. were, "the latter could not be allowed to say, under the circumstances, 'We do not wish to keep your goods; we cannot "pay for them, and wish you to take them back,' and "plaintiff assenting thereto, why from the time of such "assent the former should not be deemed and treated as "bailees of the goods, holding them for the plaintiff's "benefit, without violating the said provisions of the "Statute of Frauds."

Compare *Mason v. Redpath*, 39 U. C. Q. B. 157, where it was held that the goods had not passed to the purchaser and the contract for sale could be rescinded.

Sale distinguished from contract for work and labor. Contract to put up a building. As stated in the text, p. 16, the importance of this distinction is very much less now than it was when strict forms of pleading were in use. But the distinction is still of importance in determining whether a given contract is within the Statute of Frauds or not. Different criteria have been made use of for this purpose. The test applied by Pollock, C.B., in *Clay v. Yates*, 1 H. & N. 77, was "whether the work was the essence of the contract "or whether it was the materials supplied." This test

was distinctly rejected by the Court in *Lee v. Griffin* 1 B. & S. 272, which has settled the law. No matter what relative value the work and labor may have as compared to the materials used, the contract is one for the sale of goods if the work and labor are to result in the transfer of the property in a chattel from one to another.

In a case in Manitoba, *Ross v. Doyle*, 4 Man. 434, the contract was to put up a building with frame for tent "according to plan for \$500." It was held that, although the circumstances might tend to support the view that the contract was for work and labor, yet the plaintiff having, without the defendant's sanction, pulled down and carried away the building he could not be heard to say that it was not the sale of a chattel, the property in which had passed to the defendant.

Sale distinguished from bailment. Grain stored in elevator mixed with that of others. In *Lawlor v. Nicol*, 12 Man. 224, it was held that where wheat or other merchandise was received in a warehouse or elevator nominally on storage for the person delivering it, but on such terms that the identical goods were so mixed up with others that they could not be returned, and the well understood course of the business was that, unless a price was agreed on, the party delivering the goods could only require an equivalent amount of the same kind and quality to be accounted for to him, the contract between the parties was really one of sale and not of bailment, whether the vendor was to receive the price in money or an equal quantity of goods, or had an option to do either, as the property in the goods had passed to the warehouse man. "In such a case the Statute of Frauds offered no bar to the recovery of the price or value of the goods so stored in case the warehouse man denied receipt of the same."

This case follows a case reported in 6 *Moore*. P. C. N. S. 341. Dr. Bennett says that this principle is adopted in the United States, and that Indiana is entitled to the credit of having first applied it to the case of a miller in *Ewing v. French*, 1 Blackf. 354 (1825). There the plaintiff delivered wheat to a miller to be exchanged for flour. The wheat was mixed by the miller with his common stock,

and the wheat having been burned, the plaintiff recovered its value as goods sold and delivered, the court saying: "It was a sale of wheat, to be paid for in flour." This, says Dr. Bennett, was "nearly fifty years before the Privy Council decided *Randell's* case, cited by Mr. Benjamin "to the same point." He thinks, however, that if the written contract stipulates that the property remains "at the risk of the owner," the transaction should not be considered a sale, but only a bailment.

The subject need not be further discussed in this connection, as it must rarely happen that any question can arise under the Statute of Frauds. If it is a bailment the statute does not apply. If it is a sale it is difficult to conceive of a case in which the statute would not be satisfied by acceptance and actual receipt, in view of the latest authorities as to the meaning of "acceptance." Dr. Bennett's discussion is in the seventh American edition of Benjamin on Sales, with American Notes by Edmund H. Bennett, LL.D., and Samuel C. Bennett (1899), p. 5, which refers to an article in the 6 Am. Law Rev., p. 450, "understood to be by Mr. "Justice Oliver Wendell Holmes."

A case occurs in the Territories Law Reports, vol. 4, p. 64, *Cargo v. Joyner*, in which it was held that the delivery of tickets for grain only showed delivery to the miller, but did not prove a sale to him.

CHAPTER II.

THE FIRST EXCEPTION.

SECTION I.—*What constitutes an acceptance*, p. 19.

II.—*And an actual receipt*, p. 26.

HAVING considered what contracts are within the 4th section of the Sale of Goods Act, it becomes necessary to inquire what circumstances will satisfy the statute. It will be observed, on looking at the language of the section, that there are three different modes pointed out in which the contract may be made good, and it is convenient to treat of each of the three ways separately. First, then, what is meant by the first exception, viz., “unless the buyer shall accept part “of the goods so sold, and actually receive the same”?

If we seek for the meaning of the section, judging merely from its words, and without reference to decisions, it seems that this provision is not complied with unless the two things concur: the buyer must accept, and he must actually receive part of the goods; and the contract will not be good unless he does both. And this is to be borne in mind, for as there may be an actual receipt without any acceptance, so may there be an acceptance without any receipt. In the absence of authority, and judging merely from the ordinary meaning of language, one would say that an acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfilment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods assigning grounds false or frivolous, or assigning no

reasons at all, it is still clear that he does not accept the goods, and the question is not whether he ought to accept, but whether he *has* accepted them. The question of acceptance or not is a question as to what was the intention of the buyer as signified by his outward acts, and the test to be applied is whether the buyer has done any act in relation to the goods which recognizes a pre-existing contract of sale.

The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of an acceptance, but it is not the same thing; indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package to see whether it answers his order or not; it may even be reasonable to try part of the goods by using them; but though this is a very actual receipt, it is no acceptance so long as the buyer can consistently object to the goods as not answering his order. It follows from this that a receipt of goods by a carrier or on board ship, though a sufficient delivery to the purchaser, is not an acceptance by him so as to bind the contract, for the carrier, if he be an agent to receive, is clearly not one to accept the goods (a). The words used in the section are the same as those used in the 17th section of the Statute of Frauds, and the decisions under that statute must be looked at in order to determine what constitutes an acceptance and receipt under the section.

On the whole the cases are pretty consistent with each other as to what forms an acceptance within the statute, though not as to the strength of the proof required to establish it. On the question of what constitutes an actual receipt there is some difficulty in reconciling the cases, but we shall return to this part of the subject after citing a few cases to show what is an acceptance.

(a) *Sanderson v. Vigers*, [1901] 1 K. B. 608.

SECTION I.—*What constitutes an acceptance.*

In *Hinde v. Whitehouse* (a), in 1806, sugar was sold by auction under the following condition:—"The sugars to be taken with all faults and defects, as they now are at the King's weights and tares, with the allowance of draft, or reweighed giving up the draft." Previously to the sale samples were drawn from each hogshead. It was proved that the samples used at such sales were always delivered to the buyers as a part of their purchase to make up the quantity, and that in this particular case the samples had been delivered to and kept by the defendant, who was the highest bidder for sugar at a price above 10*l*. The defendant's counsel contended that the samples were accepted as specimens only and not as part of the goods sold, but the Court of King's Bench decided otherwise. Lord Ellenborough, in delivering judgment, said, "Inasmuch as the half-pound sample of sugar out of each hogshead in this case is, by the terms and conditions of sale, so far treated as part of the entire bulk to be delivered, that it is considered in the original weighing as constituting a part of the bulk actually weighed out to the buyer, and to be allowed for specifically if he should choose to have the commodity re-weighed, I cannot but consider it as a part of the goods sold under the terms of the sale, accepted, and actually received as such by the buyer; and, although it be delivered partly *alio intuitu*, namely, as a sample of quality, it does not therefore prevent its operating to another consistent intent also in pursuance of the purposes of the parties as expressed in the conditions of sale, namely, as a part delivery of the thing itself *as soon as, in virtue of the bargain*, the buyer should be entitled to retain, and should retain it accordingly." There could be no question in that case that the buyer had actually received the samples, and it is difficult to give a more concise and accurate definition of the time when an actual receipt becomes an actual

(a) *Hinde v. Whitehouse*, 7 East, 558.

receipt and acceptance than is contained in the last few words above quoted.

In *Morton v. Tibbett* (a), in 1850, where the defendant agreed to buy and to send for fifty quarters of wheat, the sale was by sample which he took away with him. He resold it by the same sample, and when the wheat arrived he tendered it to his buyer, who refused to take it, as it did not agree with the sample. The defendant then refused to accept it from the plaintiff. It was argued that there was no evidence of an acceptance to satisfy the statute. But the Court held that there was, and, inasmuch as Lord Campbell said that the defendant had done nothing to preclude himself from objecting that the wheat was not up to sample, he does not appear to have considered that tendering to the sub-vendee was evidence of acceptance, and if that be so, the only evidence was the accepting the sample (b). Lord Campbell, C. J., said (c), "We are therefore of opinion that there may be an acceptance and receipt within the meaning of the Act, without the buyer having examined the goods or done anything to preclude him from contending that they do not correspond with the contract." And this opinion was confirmed by Lord Campbell, C. J., in *Parker v. Wallis* (d), in 1855, and by Bramwell, B., in *Castle v. Sworder* (e). The acceptance of the sample is a present actual acceptance, with the proviso that it may be returned if the bulk do not correspond with it.

In *Page v. Morgan* (f), in 1885, where there was a sale of wheat by sample, and the buyer having received a number of sacks of wheat delivered under the contract into his premises opened the sacks to see if they were equal to sample, but immediately after so doing gave notice to the seller that he refused the wheat as not being equal to sample, it was held that there was evidence of acceptance.

(a) *Morton v. Tibbett*, 19 L. J. Q. B. 382; 15 Q. B. 428.

(b) See also *Gardner v. Grout*, 2 C. B. N. S. 340.

(c) 15 Q. B. 434.

(d) *Parker v. Wallis*, 5 E. & B. 21.

(e) *Castle v. Sworder*, 5 H. & N. 287.

(f) *Page v. Morgan*, 54 L. J. Q. B. 434; 15 Q. B. D. 228.

In *Abbott v. Wolsey* (a), in 1895, where goods sold were delivered to the buyer, who took a sample from them, and after examining it said the goods were not equal to his sample, and he would not have them, it was held that there was evidence of an act done by him in relation to the goods which recognized a pre-existing contract of sale, and therefore evidence of an acceptance within the meaning of section 4 (3) of the Sale of Goods Act, which now gives these decisions a statutory sanction.

In *Phillips v. Bistolli* (b), in 1824, the sale was at an auction, one of the conditions being that the buyer was to pay 30*l.* per cent. upon being declared the highest bidder, and the residue before the goods were removed. The defendant had some earrings knocked down to him at 88*l.*: they were handed to him; after three or four minutes he returned them, stating that he thought the bidding was 48*l.* The auctioneer brought an action for the price, and Abbott, C. J., told the jury that, if there was no mistake as to the bidding, there was in law an acceptance and actual receipt. The jury found there was no mistake, and a verdict was entered for the plaintiff. The Court of King's Bench granted a new trial, because the delivery of the earrings to the buyer, who had neither paid deposit nor price, was at most but very slight evidence that the seller parted with the right of possession, and that the keeping of the goods for a few minutes was but slight evidence of an acceptance by him as owner; in short, they thought that the buyer was not proved to be either, in the language of Lord Ellenborough above quoted, "entitled in virtue of the bargain to retain," nor to have "retained accordingly." The two cases agree most accurately as to what must be proved, though it may be that Lord Ellenborough would have thought the evidence in *Phillips v. Bistolli* (b) sufficient, whilst, perhaps,

(a) *Abbott v. Wolsey*, 64 L. J. Q. B. 587; [1895] 2 Q. B. 97.

(b) *Phillips v. Bistolli*, 2 B. & C. 511. See also *Taylor v. Smith*, 61 L. J. Q. B. 331; [1893] 2 Q. B. 65; *Taylor v. G. E. Railway*, 70 L. J. K. B. 114; [1901] 1 K. B. 774; *Rennie v. Moss*, W. N. (1902) 122.

the Judges of 1824 would have hesitated in *Hinde v. Whitehouse* (a).

In *Kent v. Huskisson* (b), in 1802, the facts seem all to have been truly stated in a letter from the defendant to the plaintiff: "After receiving a letter from your house in town, "stating the bale of sponge was sent by your directions, I "called in a friend or two who are competent judges of the "article, and asked them to say, according to the present "price of sponge, what it was worth. The answer was, "not more than 6s. per pound: have therefore returned "it to you by the same conveyance." There had been a verbal contract for the sale of more than 10l. worth of sponge at 11s. per pound. The Common Pleas were clear that these facts did not amount to an acceptance and receipt. Heath, J., observed, that the buyer, to bring the case within the words of the statute, must "both accept and receive. "Now that acceptance I cannot consider to be any other than "the ultimate acceptance, and such as completely affirms the "contract." Chambre, J., said, "Certainly there was no "acceptance of the goods by the defendant, unless we can "consider a refusal to accept as amounting to an acceptance." The acceptance under the statute must be with the intention of taking possession as owner, as Parke, B., said in *Farina v. Home* (c).

In *Hunt v. Hecht* (d), in 1853, the defendant examined a heap of bones lying on the plaintiff's premises, and instructed the plaintiff to put a certain quantity into sacks and to send them to a wharf for shipment. As soon as he heard of the delivery at the wharf he inspected them and refused to accept them as not being what he had bargained for, and the Court held that although there was a receipt there was no evidence of acceptance (e).

(a) *Hinde v. Whitehouse*, 7 East, 558.

(b) *Kent v. Huskisson*, 3 B. & P. 233.

(c) *Farina v. Home*, 16 L. J. Ex. 73 ; 16 M. & W. 123.

(d) *Hunt v. Hecht*, 22 L. J. Ex. 293 ; 8 Ex. 814.

(e) See also *Norman v. Phillips*, in 1845, 14 L. J. Ex. 306 ; 12 M. & W. 277, where the Court was of opinion that although there might be a scintilla of

In *Nicholson v. Bower* (a), in 1858, the plaintiff was the buyer's assignee; the buyer had agreed to buy by sample, of the defendant, 141 quarters of wheat which the defendant sent to London, where it was warehoused by a carrier. The buyer sent to the warehouse for a sample, and, having examined it, gave orders that the bulk was not to be sent for. He was then insolvent, and the Court, being of opinion that he acted in this way thinking that he ought not under the circumstances to accept the wheat, held that there had been no acceptance.

In *Hart v. Bush* (b), in 1858, the buyer in Lancaster ordered brandy of the seller's traveller to be sent to a wharf in London to be shipped from there to him at Lancaster: the ship was lost. It was held that there was no acceptance.

In *Simmonds v. Humble* (c), in 1862, the defendant, having purchased hops lying in a warehouse, by sample, sent his agent to meet the plaintiff's agent: the two agents went over the hops, compared the bulk with the sample, and agreed on certain allowances. Nothing further was done, and the Court was of opinion that this was evidence of acceptance.

In *Hanson v. Armitage* (d), in 1822, the King's Bench decided that a receipt by the buyer's customary carrier was no acceptance; and in *Acebal v. Levy* (e), in 1834, the Common Pleas ruled the same point of a receipt on board a ship chartered by the buyer. The reason assigned in both cases was the same: the buyer might still consistently object to the goods when they came to his hands, in other words, the agent was not an agent having authority to accept the goods, though he had authority to receive them (f).

evidence, there was not sufficient evidence to warrant a jury in finding that there had been an acceptance.

(a) *Nicholson v. Bower*, 28 L. J. Q. B. 97; 1 E. & E. 172; cf. *Taylor v. G. E. Railway*, 70 L. J. K. B. 114; [1901] 1 K. B. 774.

(b) *Hart v. Bush*, 27 L. J. Q. B. 271; E. B. & E. 494.

(c) *Simmonds v. Humble*, 13 C. B. N. S. 258; 9 L. T. 168.

(d) *Hanson v. Armitage*, 5 B. & A. 557.

(e) *Acebal v. Levy*, 10 Bing. 376.

(f) *Coombs v. Bristol and Exeter Ry. Co.*, in 1858, 27 L. J. Ex. 401; 3 H. & N.

These cases are inconsistent with and must be considered as overruling a *Nisi Prius* decision of Chambre, J. (a), in 1814, in which he considered that the buyer constituted the usual carrier his agent to accept and receive.

In *Elliott v. Thomas* (b), in 1838, the defendant ordered certain bundles of cast and common steel from the plaintiff, and there was no doubt that he accepted the common steel, but he refused to pay for the cast. Parke, B., said it must be taken to have been one contract, and therefore there was an acceptance to satisfy the statute.

In *Scott v. The Eastern Counties Ry. Co.* (c), in 1843, the defendants ordered of the plaintiff several lamps of different constructions, and among them a triangular lamp, which was the one in question; they were all delivered and paid for except the triangular one, which took a long time to make, and when made the defendants refused to accept it. The Court held that it was one contract, and that the acceptance of some of the lamps took the case out of the statute.

In *Bigg v. Whisking* (d), in 1853, the defendant accompanied the plaintiff to several places a few miles apart, and bought timber at each; the plaintiff then signed a memorandum of what had taken place. The defendant, after accepting some of the timber, refused to accept the residue. But the Court was of opinion it was one contract, and that there had been a part acceptance, following *Elliott v. Thomas* (b).

In *Beaumont v. Brengeri* (e), in 1847, where the defendant agreed to purchase a carriage and had some alterations made in it, and had it placed in a back shop, and subsequently drove out in it, paying the hire of the horse and man, it was held that there was sufficient evidence of acceptance.

510; *Cusack v. Robinson*, in 1861, 30 L. J. Q. B. 261; 1 B. & S. 299; *Coates v. Chaplin*, in 1842, 3 Q. B. 483; 6 Jur. 1123. See also *Sanderson v. Vigers*, [1901] 1 K. B. 608.

(a) *Hart v. Sattley*, 3 Camp. 528. This case is no longer law, 2 E. & B. 370 E. B. & E. 498.

(b) *Elliott v. Thomas*, 3 M. & W. 170.

(c) *Scott v. The E. C. Ry. Co.*, 13 L. J. Ex. 14; 12 M. & W. 33.

(d) *Bigg v. Whisking*, 14 C. B. 195.

(e) *Beaumont v. Brengeri*, 5 C. B. 301.

In *Cusack v. Robinson* (a), in 1861, the defendant saw certain firkins of butter lying in the plaintiff's cellar at Liverpool. He agreed to buy them and gave instructions to the plaintiff as to sending them to Fenning's Wharf in London, where they were eventually delivered. There was ample evidence of receipt, but the defendant's case was that the acceptance should follow, or be contemporaneous with, the receipt. The Court held that it might be after it, and upheld the verdict for the plaintiff.

In *Taylor v. Wakefield* (b), in 1856, the plaintiff had entered into possession, as tenant of the defendant, of a certain mill and machinery. There was a verbal agreement that upon the expiration of the tenancy the plaintiff might take the machinery at a price. When the plaintiff tendered the money the defendant repudiated the contract. The Court held that there was no evidence of acceptance before the contract was revoked. Erle, J., said, "If the purchaser takes "to the goods as such, and changes the character in which he "holds them, it is an acceptance as against him, . . . and it "may be, that such an act, if done by the purchaser in "furtherance of the contract before it is revoked, would bind "the contract as against the vendor also."

And in *Smith v. Hudson* (c), in 1865, where, on the insolvency of the buyer, the seller, who had delivered goods at a railway station, ordered the railway company not to deliver them, and at that time the buyer, who had a right to reject them if they were not up to sample, had not elected to accept them, but did so after the countermand, the Court held that there could be no acceptance without the consent of the seller.

And if the buyer accepts the goods, but says at the time that he accepts them on other terms than those on which the seller is willing to deliver them, that is a sufficient acceptance (d).

(a) *Cusack v. Robinson*, 30 L. J. Q. B. 261 ; 1 B. & S. 299.

(b) *Taylor v. Wakefield*, 6 E. & B. 765 ; 2 Jur. N. S. 1086.

(c) *Smith v. Hudson*, 34 L. J. Q. B. 145 ; 6 B. & S. 431.

(d) *Tomkinson v. Staught*, in 1856, 25 L. J. C. P. 85 ; 17 C. B. 698.

In addition to the cases above referred to, there are a good many which are authorities on both points, viz., whether there was a receipt, and also whether there was an acceptance, and these will be found in the following section.

SECTION II.—*What constitutes an actual receipt.*

The cases, as has been already observed, are not quite so easily reconciled upon the question of what constitutes an actual receipt. There can be no question, that an actual removal of the goods by the buyer is an actual receipt by him; and when the goods are in the hands of a third party, it is pretty clear that as soon as the seller, the buyer, and the bailee agree together that the bailee shall cease to hold the goods for the seller and shall hold them for the buyer, that is an actual receipt by the buyer, though the goods themselves remain untouched. They were in the possession of an agent for the seller, and so in contemplation of law in that of the seller himself; and they become in the possession of an agent for the buyer, and so in that of the buyer himself; and it can make no difference whether this is by a change in the person of the holder of the goods or merely in his character. So far the question of whether there has been a receipt of part of the goods by the buyer or not is identically the same as whether the seller has so parted with possession as to put an end to his lien as to that part of the goods.

Thus, in *Bentall v. Burn* (a), in 1824, the King's Bench decided that the acceptance and receipt of a delivery order not lodged with the warehouseman did not bind the bargain: till the warehouse keepers assented to hold the property as agents of the buyer they held it as agents of the seller, and whilst they did so there could be no actual acceptance (receipt?) of the goods.

It has already (b) been pointed out that a carrier, although not an agent to accept, is an agent to receive.

(a) *Bentall v. Burn*, 3 B. & C. 423.

(b) *Ante*, pp. 23, 24.

But when the goods are in the custody of the seller himself or his immediate servants, and not of a middleman, there is a difficulty. It will be shown in its proper place (*post*, page 362), that when the buyer or his assigns and the seller come to an agreement that the seller shall cease to hold the goods as seller and shall hold them as an agent of the owner of the goods, his rights as seller are gone; and though the cases now show that such an agreement between the seller and the original buyer himself must be proved by stronger evidence than one between him and a sub-vendee, it does not seem disputed that such an agreement may be made. At one time the weight of authority was, that such an agreement was to be readily presumed; now the weight of authority is, that such an agreement must be very distinctly proved, and that unless the seller's lien on some part of the goods be gone there cannot be an *actual* receipt.

In *Chaplin v. Rogers* (a), in 1800, the plaintiff, by a verbal agreement, sold to the defendant for more than 10*l.* a stack of hay, which he represented to be good. The hay remained in the plaintiff's stack-yard. The defendant seems to have expressed an opinion that the hay was bad, but some time after, one Loft having agreed for the purchase of part of the hay from him at an advanced price, the defendant told him to go and see if it was good. Loft not only thought it good, but took away part without the knowledge or assent of the defendant. The part resold to Loft seems to have been for less than 10*l.*, in which case the bargain between him and the defendant may have been binding, so that the defendant could not have revoked the authority given to Loft by it, but the case does not seem to have turned upon that. It was left to the jury to say if there had been an acceptance, and they having found there was, the King's Bench would not disturb their verdict. The expressions used by Lord Kenyon in delivering judgment, show that he thought there might be an acceptance and actual receipt without a removal of the goods; and that the conduct of the defendant, in bargaining about the re-sale,

(a) *Chaplin v. Rogers*, 1 East, 195, n.

was an admission that the contract was good ; but he concludes by saying, " As upon the whole justice has been done, " the verdict ought to stand " ; which almost means that the verdict was contrary to evidence. If this case had been tried after the Sale of Goods Act came into operation the finding of the jury would not have been inconsistent with section 4 (3).

In *Anderson v. Scott* (a), in 1806, at Nisi Prius, the action was by the buyer against the seller for not delivering wine according to a verbal agreement for the sale of it for a price exceeding 10*l*. The spills had been cut in the presence of both parties, and the buyer's initials were marked on the casks, which remained in the seller's cellars. It was objected, that the bargain was void by the Statute of Frauds, but Lord Ellenborough held that the marking of the casks in the presence of all parties amounted to a delivery, and that though there had been an incipient delivery sufficient to take the case out of the Statute of Frauds, yet that delivery not having been perfected, the plaintiff had a right of action to recover damages for the non-completion of the contract.

In *Hodgson v. Le Bret* (b), in 1808, the same Judge ruled that the buyer having written her name on some goods to denote that she had purchased them, though they remained in the seller's shop, took the case out of the statute. Parke, J., has observed, " that in the older cases the Court " did not advert to the words of the statute " (c). Certainly, in *Anderson v. Scott* (a), Lord Ellenborough, if the words of the statute were present to his mind, must have thought that there might be an actual receipt without any delivery, which is not the popular meaning of the words. It appears from *Hurry v. Mangles* (d), that Lord Ellenborough considered the seller's rights gone under circumstances but little stronger than those existing in *Hodgson v. Le Bret* (b) and *Anderson v. Scott* (a). He seems to have thought that the

(a) *Anderson v. Scott*, 1 Camp. 235, n.

(b) *Hodgson v. Le Bret*, 1 Camp. 233.

(c) *Smith v. Surman*, 9 B. & C. 576, 577.

(d) *Hurry v. Mangles*, 1 Camp. 452.

circumstance of the buyer exercising acts of ownership with the assent of the seller proved a complete agreement between them to consider the possession of the seller as thenceforward that of a mere agent of the buyer.

In *Elmore v. Stone* (a), in 1808, the Common Pleas acted upon this principle. In that case the defendant, the buyer of horses under a verbal agreement from the plaintiff, a livery stable keeper, had sent him word that he would have the horses, but that as he had neither servant nor stables, the plaintiff must keep them at livery for him. The plaintiff assented, and moved the horses into another stable (which, however, seems material only as an indication of assent). The Common Pleas, after taking time to consider, held that the bargain was bound. Mansfield, C. J., in delivering the opinion of the Court, said, "After the defendant had said "that the horses must stand at livery, and the plaintiff had "accepted the order, it made no difference whether they "stood at livery in the vendor's stable, or whether they had "been taken away and put in some other stable. The plaintiff possessed them from that time not as owner (seller?) "of the horses, but as any other livery stable keeper might "have them to keep. Under many events, it might appear "hard if the plaintiff should not continue to have a lien "upon the horses which were in his own possession, so long "as the price remained unpaid, but it was for him to consider "that before he made his agreement. After he had assented "to keep the horses at livery, they would on the decease of "the defendant have become general assets; and so if he had "become bankrupt, they would have gone to his assignees. "The plaintiff could not have retained them, though he had "not received the price."

In *Blenkinsop v. Clayton* (b), in 1817, after a verbal sale of a horse standing in a stable during a fair to which it had been sent for sale, the buyer offered to resell it to a third party, but afterwards refused to go on with the bargain :

(a) *Elmore v. Stone*, 1 Taunt. 458.

(b) *Blenkinsop v. Clayton*, 7 Taunt. 597.

the seller brought an action for the price, and on proof of the facts above stated had a verdict subject to leave to move to enter a nonsuit, on the ground that there was nothing to satisfy the statute. The Court of Common Pleas thought that there might be some evidence of a delivery, and therefore granted a new trial, not a nonsuit.

In all these cases there seems to have been ample evidence of an acceptance of the goods, but scanty evidence of any actual receipt, if by that is to be understood a taking of possession; indeed, in *Blenkinsop v. Clayton* (a), as reported, there seems to have been none. After the decision of the last case, the current of authority set the other way, and it became necessary to prove distinctly that the seller had agreed to hold the goods as the bailee of the buyer.

In *Howe v. Palmer* (b), in 1820, there was a verbal sale of twelve bushels of tares at 1*l.* per bushel, the buyer to send for them. The buyer said he had seen the tares, and had no immediate use for them; he therefore requested that they might remain at the seller's till seed-time, to which the seller assented. The seller then went home, measured out twelve bushels, and set them aside for the buyer. The King's Bench held that these facts did not amount to an acceptance and receipt. The case was distinguished by the Court from *Elmore v. Stone* (c), but Bayley, J., expressed a doubt if that case was well decided.

In *Tempest v. Fitzgerald* (d), in the same year, the facts were, that a horse was sold by parol for 45*l.* ready money; after the sale, the buyer mounted it and tried it, and made some changes in its harness; he then asked the seller to keep it another week; the seller said he would oblige him; before the week expired the horse died, and the question was who should bear the loss. The King's Bench decided that these acts could not amount to an acceptance and receipt, unless the buyer had a right under the bargain to

(a) *Blenkinsop v. Clayton*, 7 Taunt. 597.

(b) *Howe v. Palmer*, 3 B. & A. 321.

(c) *Elmore v. Stone*, 1 Taunt. 458, *ante*, p. 29.

(d) *Tempest v. Fitzgerald*, 3 B. & A. 680.

take away the horse. He could not take away the horse unless he paid the price, or the seller waived his right of lien, which the facts did not show.

In *Carter v. Touissaint* (a), in 1822, the facts approached very nearly indeed to those in *Elmore v. Stone* (b). The defendant purchased by parol, from the plaintiffs, a horse for 30*l.*; the horse was, by the defendant's consent and approval, fired, and the plaintiffs agreed to keep it for twenty days without charge; at the end of the twenty days the plaintiffs sent the horse to grass at the defendant's request, but entered it in their own name, as the defendant wished to conceal his having bought it. The King's Bench held that the plaintiffs must be taken to have kept possession in their character of sellers until something showed an abandonment of their lien, and that so long as there was nothing to divest them of their possession in the character of sellers, there could be no receipt by the buyer within the Statute of Frauds. The Court made some attempt to distinguish the case from *Elmore v. Stone* (b) on the ground that in that case there was a change of stables, but that fact the Common Pleas had expressly declared to be immaterial. The two cases are agreed in this, that there could not be a receipt till the seller's lien was divested, but they differ as to what is sufficient to divest the lien.

Boulter v. Arnott (c), in 1833, which really turned on the form of pleading, is instructive as showing the difference between "acceptance" and "receipt." The action was assumpsit for goods sold and delivered, and the facts were that the defendant went into the plaintiff's shop and purchased some cigars, which were packed in boxes supplied by the defendant, and left in the plaintiff's shop to be called for. The cigars were to be paid for before being removed. On the motion to set aside the nonsuit, Bayley, B., said, in refusing it, "From first to last these goods remained in

(a) *Carter v. Touissaint*, 5 B. & A. 855.

(b) *Elmore v. Stone*, 1 Taunt. 458, ante, p. 29.

(c) *Boulter v. Arnott*, 1 Cr. & Mee. 333.

“the possession of the plaintiff. It is an entirely different question, whether doing an act like marking or packing for the vendee in his presence may not operate as an acceptance by him under the Statute of Frauds. The question here is whether there was a delivery to the vendee. I do not agree that the boxes are to be considered as having been the warehouse of the defendant.”

In *Holmes v. Hoskins (a)*, in 1854, the defendant selected some cattle in the plaintiff's field, and was going to pay for them, but found he had forgotten his cheque book. The plaintiff and defendant then arranged that the cattle should remain for some days in the plaintiff's field, and that the defendant should send his men to feed them, which was done. The Court held that there was no evidence of receipt.

In *Castle v. Sworder (b)*, in 1861, the plaintiffs were wine merchants, and also acted as warehousemen, having a bonded warehouse where they warehoused goods of others and allowed the goods they sold to remain, charging a rent to the purchaser. They sold certain rum to the defendant at six months' credit, and it was agreed that the rum should lie in the warehouse for six months free of charge. They sent the defendant an invoice, which stated in effect that the rum might remain six months without charge, and entered the defendant's name in their warehouse-book as purchaser. After the expiration of the credit the defendant asked the plaintiffs to take back the rum, and they declined. The plaintiffs were nonsuited by Bramwell, B., and Martin, Channell, and Bramwell, BB., sustained the nonsuit on the motion, but on appeal to the Exchequer Chamber, Cockburn, C. J., Crompton, Williams, Byles, and Keating, JJ., held that there was some evidence of an acceptance and receipt, and ordered a verdict to be entered for the plaintiffs. A contract with a person known to be a warehouseman to warehouse goods free of charge for six months is certainly some evidence against both parties that the warehouseman holds as such and not as

(a) *Holmes v. Hoskins*, 9 Ex. 753.

(b) *Castle v. Sworder*, 30 L. J. Ex. 310; 5 H. & N. 281; 6 H. & N. 828; cf. *Evans v. Roberts*, 56 L. J. Ch. 592; (1887), 36 Ch. D. 196.

seller, and that coupled with the request to take back the rum appears to be clearly some evidence of an actual receipt. It is worth noting also that, the sale being on credit, the seller's lien was gone at one time. During the currency of the credit the seller cannot exercise his lien unless the buyer become insolvent, but when the term of credit has expired the lien revives (a).

In *Marvin v. Wallis* (b), in 1856, the seller remained in possession of a horse after the sale. The jury found that the buyer had lent it to the seller to keep, and the seller obtained a verdict which the Court refused to set aside.

In *Baldey v. Parker* (c), in 1823, the defendant bargained in the plaintiff's shop for goods above the value of 10l.; some of the articles were measured in his presence, some he marked in pencil, some he assisted in cutting from a larger piece. The King's Bench decided that there was no evidence that the bargain was bound. The ground of their decision is concisely stated by Holroyd, J.: "Upon a sale of specific goods for a specific price, by parting with the possession, the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." This case very closely resembles *Anderson v. Scott* (d) and *Hodgson v. Le Bret* (e) in the facts. It seems that the difference between the decisions is rather on the practical application of the law than its nature; Lord Ellenborough seems to have thought that the sellers had abandoned their lien under circumstances which in *Baldey v. Parker* (c) were held not to be any evidence of such abandonment.

In *Smith v. Surman* (f), in 1829, the King's Bench, of

(a) See section 41 (1) (b) of the Sale of Goods Act.

(b) *Marvin v. Wallis*, 25 L. J. Q. B. 369; 6 E. & B. 726.

(c) *Baldey v. Parker*, 2 B. & C. 37.

(d) *Anderson v. Scott*, 1 Camp. 235, n.

(e) *Hodgson v. Le Bret*, 1 Camp. 233.

(f) *Smith v. Surman*, 9 B. & C. 561.

which Littledale, J., and Parke, J., had become members, acted on the principle laid down in *Baldey v. Parker* (a).

In *Maberley v. Shepherd* (b), in 1833, the plaintiff, under a verbal contract, was building a wagon for the defendant; the defendant furnished a tilt and ironwork, which he fixed on the wagon whilst it was building. The plaintiff brought an action for goods sold and delivered, and was nonsuited. The Court of Common Pleas refused to set aside the nonsuit. It is difficult to see how any question on the Statute of Frauds could arise, as according to the report there was not a shadow of proof that the goods were delivered, and there was no count for goods bargained and sold, or for not accepting goods. But the report probably is in some respect inaccurate, for the Court did consider the question of whether the bargain was bound, and they decided it was not. "The plaintiff," said Tindal, C. J., "retained his lien upon the wagon, and "there was nothing in the facts that denoted any intention "either to deliver or accept. The circumstances of the case "certainly leave it open to doubt whether the statute has "been complied with or not, but we think it is the duty of "the plaintiff to free the case from all doubt, and where any "remains, that it is safer to adhere to the plain intelligible "words of the statute, which point as clearly as words can to "an actual delivery and an actual receiving of part or the "whole of the goods sold."

In *Bill v. Bament* (c), in 1841, the defendant having bargained for a quantity of brushes from the plaintiff, saw them at the warehouse of the plaintiff's agent, Harvey by name, and directed a boy to alter the mark on them, and to send them to St. Catherine's Wharf. There was a signature obtained by a trick after action commenced to a receipt for the goods. The Exchequer set aside a verdict which the plaintiff had obtained for the goods sold and delivered, and entered a nonsuit. Parke, B., said, "To take the case out of

(a) *Baldey v. Parker*, 2 B. & C. 37.

(b) *Maberley v. Shepherd*, 10 Bing. 99.

(c) *Bill v. Bament*, 9 M. & W. 37.

“the 17th section there must be both delivery and acceptance, and the question is, whether they have been proved in the present case. I think they have not; I agree that there was evidence for the jury of acceptance, or rather of intended acceptance. The direction to mark the goods was evidence to go to the jury *quo animo* the defendant took possession of them, so also the receipt” (i.e., the receipt in writing, signed by the defendant) “was some evidence of an acceptance; but there must also be a delivery, and to constitute that, the possession must have been parted with by the owner, so as to deprive him of the right of lien; Harvey might have agreed to hold the goods as the warehouseman of the defendant, so as to deprive himself of the right to refuse to deliver them without payment of the price, but of that there was no proof.”

In *Edan v. Dudfield* (a), in 1841, the case was reversed: the seller sold the goods to his factor, who had the goods in his possession at the time of sale. The Queen’s Bench held, that if the jury thought he had taken to them as buyer, it was sufficient to satisfy the statute.

This case was approved in *Lillywhite v. Devereux* (b), in 1846, where the question was whether the defendant had taken to the goods as buyer or hirer.

In *Marshall v. Green* (c), in 1875, the sale was of standing timber, and the buyer had agreed to resell the tops and stumps, and had cut down some of the trees. Held that there was ample evidence of acceptance and receipt.

There are some expressions used in the judgment of the Queen’s Bench in *Dodsley v. Varley* (d), in 1840, which are apparently at variance with the principle of the other modern cases, but the expressions there used when construed with reference to the point before the Court do not necessarily show that the Queen’s Bench took a different view of the law from that taken in the other cases. It seems better to

(a) *Edan v. Dudfield*, 1 Q. B. 306; 5 Jur. 317.

(b) *Lillywhite v. Devereux*, 15 M. & W. 285.

(c) *Marshall v. Green*, 45 L. J. C. P. 153; 1 C. P. D. 35.

(d) *Dodsley v. Varley*, 12 A. & E. 632.

insert the report at length (so far as it bears on this point), rather than run the risk of omitting something material in abridging it. The plaintiff had obtained a verdict on a count for goods bargained and sold, and an application was made to the Court to set aside this verdict. Lord Denman delivered the judgment of the Court: "It was contended," he said, "that there was no contract completed by delivery and acceptance, so as to satisfy the Statute of Frauds. The facts were, that the wool was bought while at the plaintiff's; the price was agreed on, but it would have to be weighed; it was then removed to the warehouse of a third person, where Bamford collected the wool which he purchased for the defendant from various persons, and to which place the defendant sent sheeting for the packing up of such wool. There it was weighed, together with the other wool, and packed, but it was not paid for; it was the usual course for the wool to remain at this place till paid for. No wish was expressed to take the opinion of the jury on the fact of Bamford's agency, the defendant's counsel acquiescing in that of the Judge, provided the circumstances would amount to it in point of law. We agree that they might; therefore all these must be taken to be the acts of the defendant. Then, he has removed the plaintiff's wool to a place of deposit for his own wool; he has weighed it with his other purchases of wool; he has packed it in his own sheeting; everything is complete but the payment of the price. It was argued, that because by the course of dealing he was not to remove the wool to a distance before payment of the price, the property had not passed to him, or that the plaintiff retained such a lien upon it as was inconsistent with the notion of an actual delivery. We think that, upon this evidence, the place to which the wool was removed must be considered as the defendant's warehouse, and that he was in actual possession of it there as soon as it was weighed and packed; that it was thenceforward at his risk, and if burnt must have been paid for by him. Consistently with this, however, the plaintiff had, not what is commonly called a lien determin-

“able on the loss of possession, but a special interest sometimes, but improperly, called a lien growing out of his original ownership, independent of the actual possession, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment; but this lien is consistent, as we have stated, with the possession having passed to the buyer: so that there may have been a delivery to and actual receipt by him. This we think is the proper conclusion upon the present evidence, and there will be no rule.”

It seems perfectly clear, that if Bamford was the defendant's agent, there was ample evidence of such an appropriation of the specific wool as would have converted the agreement to sell into a [bargain and] sale, and (if the Statute of Frauds were out of the way) transfer the property and consequent risk to the defendant. The only question, therefore, in the case was, whether the facts showed such a receipt of the goods as was contemplated by the Statute of Frauds. The argument for the defendant seems to have been that the agreement by which the buyer was not to remove the wool till paid for showed that the acts done to the wool could not be done with the intention to give him possession. The Court, however, seemed to have thought that the facts showed an unequivocal delivery of the actual possession, and consequently that the agreement could only operate by giving such rights to the seller as were consistent with an actual delivery of possession to the buyer. In *Howes v. Ball* (a) it was decided that an agreement of this kind did not confer on the seller any right either of property or possession in the goods actually delivered, but at most operated as a personal licence from the purchaser. Probably the Queen's Bench, in *Dodsley v. Varley* (b), would have come to the

(a) *Howes v. Ball*, 7 B. & C. 484; and cf. *Sewell v. Burdick* (1884), 52 L. J. Q. B. 428; 10 Ap. Ca. 74, at p. 95.

(b) *Dodsley v. Varley*, 12 A. & E. 632.

same decision if it had been material to determine what rights Dodsley had in the wool, but that being perfectly immaterial to the question then before the Court, they did not consider that point. The judgment, therefore, in *Dodsley v. Varley* (a) cannot be taken to show that the Queen's Bench thought that there might be an actual receipt of goods by the buyer within the meaning of the Statute of Frauds without such a taking of possession by him as would completely determine the seller's rights in the part of the goods so received, and consequently the case does not affect the authority of *Baldey v. Parker* (b), and the other cases before quoted.

It may therefore be considered as having been settled, that the construction of the statute was that so concisely and clearly stated by Holroyd, J., in *Baldey v. Parker* (b), and repeated in almost the same terms by Parke, B., in *Bill v. Bament* (c), namely, that the facts which prove that part of the goods have been delivered and taken into the buyer's control, so as to determine the seller's possession of that part, prove that he has actually received them, and that nothing short of such a delivery and taking could amount to an actual receipt by the buyer within the meaning of the Statute of Frauds.

In *Farina v. Home* (d), in 1846, where the seller sent a case of eau de Cologne to his agent in London, who warehoused it, obtained a delivery-warrant and indorsed it to the buyer, who kept it in his possession for ten months, the Court held that although there was sufficient evidence of an acceptance there was none of the receipt.

In *Currie v. Anderson* (e), in 1860, the defendant sent to Hanson & Co., in Constantinople, the bill of lading for goods which he had ordered from the plaintiffs but not examined, and which the plaintiffs had shipped at his request. The bill

(a) *Dodsley v. Varley*, 12 A. & E. 632.

(b) *Baldey v. Parker*, 2 B. & C. 37, *ante*, p. 33.

(c) *Bill v. Bament*, 9 M. & W. 37.

(d) *Farina v. Home*, 16 L. J. Ex. 73; 16 M. & W. 119.

(e) *Currie v. Anderson*, 29 L. J. Q. B. 87; 2 E. & E. 595.

of lading was to be handed over by Hanson & Co. to a person named by the defendant when he should call for it. That person was unable to call for it for some months, and then the goods were not forthcoming. The Court held there was ample evidence of acceptance and receipt.

In the following case of *Meredith v. Meigh* (a), in 1853, there seems to have been no evidence either of acceptance or receipt, although there had been a delivery to a carrier.

China clay was to be sent, according to a verbal agreement, by the seller in Cornwall, by sea to Liverpool, and thence by a carrier to the buyer in Staffordshire. The seller sent the bill of lading to the carrier to enable him to obtain delivery at Liverpool. The cargo was lost at sea, and the buyer, who was the defendant, objected that there was no evidence of an acceptance and receipt. The defendant obtained a verdict, which the Court refused to set aside.

Erle, J., said, "Placing goods ordered on board ship is "good evidence of a delivery in support of a count for goods "sold and delivered; but that is not the same as the question "under the 17th section of the Statute of Frauds. I have "no doubt that the bill of lading, which is the symbol of the "property, may be so received and dealt with as to be "equivalent to an actual receipt of the property itself." But that was not the case here.

(a) *Meredith v. Meigh*, 22 L. J. Q. B. 401; 2 E. & B. 364.

Acceptance and Receipt to Satisfy the Statute of Frauds. Engraving Purchaser's Name on Goods Pursuant to Order Since the case of *Morton v. Tibbett*, 15 Q.B., 8, 428, it has not been open to question that a purchaser might "accept" goods within the meaning of the term in the Statute of Frauds without precluding himself from the right to afterwards reject them as not being in accordance with the contract. The Canadian cases fully recognize the difference between the two meanings of the term "accept." In the early case of *Walker v. Boulton*, 3 O. S., 252 (1834), the dealer in plate, which the defendant had selected and purchased, was directed by him to have his arms, crest and motto engraved on the pieces. The articles were thereupon set aside, labelled with the purchaser's name, and sent to the engraver to be engraved as directed. They were then packed up and forwarded "through one of the forwarders." The objection was taken that the Statute of Frauds had not been complied with, but it was held that the direction as to the engraving, following upon the selection of the goods, was a sufficient acceptance, and that the acceptance, as had been already decided by the English cases, could precede the final delivery by the vendor.

Mere offer to re-sell goods bought at auction held not an acceptance. This was held in a case some years before the early English case of *Morton v. Tibbett*, 15 Q.B. 428, but it was not necessary to the decision of the case, the Statute of Frauds having been satisfied by the memorandum signed by the auctioneer's clerk. Robinson, C. J., said, "if it had been necessary for the plaintiffs to rely on the supposed evidence of acceptance to take the case out of the statute, they must, I think, have failed. There was nothing proved here at all equivalent to what was proved in the case of *Chaplin v. Rogers*, 1 East, 192, for there the vendee had actually sold again part of the hay purchased by him, and his vendee had taken some of the hay away. Here this defendant has done nothing more than offer to sell to a third party some of the iron which had been knocked down to him, but the mere offer to sell has not been deemed such a dealing with the goods as constitutes an acceptance. *Smith v. Surman*, 9 B. & C. 561 (1829)." It is doubtful how far this case would be recog-

nized as law since the case of *Page v. Morgan*, on which is founded the clause of the Sale of Goods Act, to the effect that there is an acceptance of goods within the meaning of the section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not. Sec. 4 (3) of the English Sale of Goods Act. The offer to re-sell was an act in relation to the goods, which would not have been done if the purchaser had not recognized the pre-existing contract, and was so held to be by Bigham, J., in *Taylor v. The Great Eastern Railway* (1901), 1 K.B. 774. The Upper Canada case referred to is *Clarkson v. Noble*, 2 U. C. R. 361. *Page v. Morgan* is reported in 15 Q. B. D. p 228 and is founded on *Kibble v. Gough*, 38 L. T. (N. S.) 841.

Sale of part of the goods proves acceptance. In *Robinson v. Gordon & Mackay*, 23 U.C.Q.B. 143 (1863), the defendant ordered cloth goods to be delivered by the 1st of April. Three cases were received, (not all together,) by the 10th of March, on which date the defendants wrote plaintiff, refusing to keep the goods on the ground of the breach of an alleged condition that plaintiff would not sell to retailers. Defendants sold part of the two cases first received, and on this ground the court held that there had been an acceptance. With our present lights, this is a very plain case, and need hardly have been mentioned, except for the exposition of the conflict between the Queen's Bench and Exchequer Courts as to the content of the term "acceptance." The case of *McMaster v. Gordon*, 20 U.C. C.P. 16, resembles the English case of *Page v. Morgan*, 15 Q.B.D. 228, in that the purchaser's clerk took exception to the goods when delivered, saying that the pieces were longer than called for by the bargain, and on the following day the defendants wrote plaintiff, complaining of the quality of the goods. While they were at the station the defendants had sold part of the goods from the sample supplied, and other sales were made later; but the defendant's clerk said that as they did not keep the goods, the orders were not filled nor the goods delivered. It was held that there had been an acceptance, and the head-note states the now familiar principle, that "there may be an acceptance of

“ goods, to take the case out of the Statute of Frauds and
“ let in proof of the actual bargain, leaving the parties still
“ able to object that goods do not answer the contract, etc.”

Such a dealing with the goods as implies the assumption of ownership is acceptance. In *Tower v. Tudhope et al.*, 37 U. C. Q. B. 200 (1875), the plaintiff agreed to sell some goods to defendant and others to W. & J. Tudhope. By agreement between defendant and the agent of plaintiff the goods were all sent in one package to W. Tudhope, invoices being sent to the respective purchasers. The goods were examined at the custom house, and the package was found belonging to the defendant, for which, owing it seems to some misunderstanding or mistake, no invoice had been given to the customs officers. Their suspicions were aroused, and the whole lot was eventually sold. Mean-time defendant had handed his invoice to Mr. Tudhope, to be forwarded to the express agent, who gave it to the customs officials. The question was whether this was a sufficient dealing with the goods by the defendant to constitute acceptance. Wilson, J., summarized the dealings as follows: “ The sending of the goods from New York
“ addressed to the defendants, and putting them in the
“ case with the defendant’s consent, addressed to W. & J.
“ Tudhope, Orillia; the sending to the defendants an in-
“ voice of the goods; the payment of duties as on the whole
“ goods by W. & J. Tudhope,—treating him for the purpose
“ as the agent for the defendants; the delivery by the
“ defendants to W. & J. Tudhope of their invoice for the
“ purpose of passing the goods through the custom house;
“ and the application for the goods to the customs authori-
“ ties or to the Express Company.” His Lordship considered that W. & J. Tudhope were the agents of the defendants, and that there had been a dealing with the defendants’ goods by both them and the defendants, which showed an assumption of ownership over the goods which was quite opposed to the ownership of them remaining in the plaintiff. This is in accordance with the modern view as to the nature of acceptance to satisfy the Statute of Frauds, “an acceptance which would perfect the contract
“ under the Statute of Frauds, although it may not have

“ been an acceptance which bound the defendants to keep
“ the goods. For there is said to be a difference between
“ the two kinds of acceptance, and although the acceptance
“ may be such as to bind the contract, it does not, never-
“ theless, prevent the purchaser from rejecting the goods
“ for just cause.” Per Wilson, J.

Taking samples of the cargo for inspection held not to amount to acceptance. The case of *Scott v. Melady*, 27 Ont., App. Rep. 193 (1900), should be read in connection with the case last referred to because its tendency is in the opposite direction to that of the earlier case. The probable explanation is that, in the meantime, a case had been decided by the Court of Appeal in England, which, while probably correctly enough decided in the result, gave countenance to the application of a criterion wholly different from that applied in the leading case of *Page v. Morgan*. Lord Herschell, in particular, seems to be looking for an acceptance which would preclude the purchaser from complaining of the goods delivered. “ No doubt,” he says, “ you might have a case in which there was such an amount “ of delay after the goods had been placed in the custody “ directed by the purchaser as to prevent the purchaser “ from withdrawing; but here there has been no such lapse “ of time as can preclude the purchaser from denying “ that he has accepted the goods.” Referring to this case of *Taylor v. Smith*, in *Taylor v. Great Eastern Railway*, 1901, 1 K. B., at 778, Bigham, J., said: “ I see by a foot- “ note that the case was reported about a year after it was “ decided, in deference to representations from various “ quarters. I think the editor would have done well to “ have resisted those representations, for the case declares “ no principle of law, and is in my opinion of no general “ application.” The case does, however, as already stated, tend to unsettle the doctrine established after many years of conflict by the case of *Page v. Morgan*, and it was inevitable that it should affect the course of subsequent development. In *Scott v. Melady*, 27 Ontario, App. Rep. 193 (1900), the defendants agreed orally to buy from the plaintiff ten thousand bushels of No. 2 red wheat, to be delivered on board a vessel to be provided by the defendants. A *jus disponendi* was reserved by the terms of the

bill of lading, taken to the order of the bank, and instructions given that the wheat should not be delivered until payment of the draft. But while the vessel was in the Welland Canal, samples were taken by the defendants, as to which Street, J., said: "The samples were taken by the defendants in order that they might determine whether they should accept the wheat or decline it; in other words, to see whether it complied with the contract or not; and as soon as they found that it was not up to the standard, they rejected it." It is well settled that the receipt of a sample being part of the goods sold is actual receipt to satisfy the requirements of the statute as to receipt. If, then, the sample was taken for the purpose of determining whether the cargo complied with the requirements of the contract, it is difficult to see why there was not such a dealing with the goods as amounted to a recognition of the contract. Yet it was held by Street, J., "without hesitation, that there was no acceptance or receipt of the wheat, or any part of it," and his decision was sustained by the Court of Appeal.

Writing a letter to vendor in reference to goods is not acceptance. This was decided by Wetmore, J., in *Calder v. Hallett*, 5 Terr. 1. The contention was made under the later doctrine as to acceptance that this was an act done in relation to the goods, but Wetmore, J., said it was an act done not in relation to the goods themselves but in relation to the order for the goods.

Acceptance is a question for the jury. In *Raymond v. Saunders*, 27 N. B. 38 (1888), the defendant went to the plaintiff's store and examined three coats, one of which was ripped in one of the seams, and gave directions that the tickets showing the prices of them should be taken off, that the defective one should be repaired, and the other two put up in several parcels and sent to his room at the hotel. The coats were put up as directed, and sent to the defendant's hotel, but not put in his room, though he saw them in the hotel. On this evidence, the judge refused to nonsuit the plaintiff, and directed the jury that when the tickets were taken off the coats, there was a transfer of the property to the defendant, and the putting the coats in parcels by his direction and sending them to his hotel was

an appropriation of them by him, which entitled the plaintiff to recover. This was held to be an improper direction. The question whether there was an acceptance of the goods by the defendant should have been left to the jury. The direction to the jury certainly confuses two different things—the appropriation necessary to pass the property, and the actual receipt required to satisfy the statute. But the decision is equally unsatisfactory. The goods were specific, and apart from the Statute of Frauds and a possible question as to the deliverable condition of the defective coat, the property would pass on the making of the contract. The real questions in the case are not dealt with by the court. The coats that were ready had certainly been accepted. The only question as to them, under the Statute of Frauds, was as to the actual receipt by virtue of the delivery at the hotel.

Contract of sale, with option to return, an entire contract, and the whole validated by acceptance and receipt of part. The case was that certain teas were sold to the plaintiffs by the defendants under a promise that defendants would pay them an advance of ten cents a pound for all of such teas as they should have unsold in stock at a later date named. It was contended that there were two separate agreements, and that the contract for the return was within the Statute of Frauds. The case is decided on the footing that there had been a finding of fact by the trial judge that there was only one contract, and not two separate contracts. That being the case, the delivery and acceptance of the teas to the plaintiffs made the whole contract enforceable. *Lumsden v. Davies*, 11 O. A. R. 585 (1885).

Actual Receipt. The Canadian cases on the subject are few of them worth noting. They merely affirm principles that are well established and understood. In *Flintoft v. Elmore*, 18 U. C. C. P. 275 (1868), it was held on the facts that there had been no actual receipt by the purchaser. In *McNeil v. Keleher*, 15 U. C. P. 470 (1865), the actual receipt, coupled with acceptance of part of the lot of cordwood sold, validated the contract as to the whole.

The acceptance and actual receipt may be proved by oral evidence. Quebec case. The contention was made in the case of *Munn v. Berger*, 10 S. C. R. 512, that under the Civil

Code of the Province of Quebec, article 1235, the facts constituting acceptance and receipt of the goods could not be proved by oral evidence. The article is given in the opinion of Henry, J., as follows: "In commercial matters
" in which the sum of money or value in question exceeds
" fifty dollars no action or exception can be maintained
" against any party or his representatives, unless there is
" a writing signed by the former in the following cases; (4)
" upon any contract for the sale of goods, unless the buyer
" has accepted or received part of the goods or given some-
" thing in earnest to bind the bargain. The foregoing rule
" applies, although the goods be intended to be delivered
" at some future time, or be not at the time of the contract
" ready for delivery."

The trial judge had held that oral evidence could not be given of the fact of acceptance by delivery to, and acts of ownership by the purchaser, but the Supreme Court of Canada held that the evidence was improperly rejected. The article is substantially the same as the section of the English Statute of Frauds from which it is taken, and the effect, so far as regards the point under consideration, was held to be the same.

Can there be actual receipt where the vendor still retains his lien? There is a dictum on this point of Sir William Robinson's in an old case of *Wegg v. Drake*, 16 U. C. Q. B. 253 (1858), in which he says: "It is not on the ground that
" the plaintiff had still a lien on the carriage for his price
" that we consider acceptance cannot be held to have been
" proved in this case, for although that has been held
" erroneously to be a criterion in some cases, it is not so
" considered at this day, and it is most reasonable that it
" should not be." Of course, the goods may have been accepted, although the unpaid vendor's lien for the price still continues, but the learned Chief Justice was probably thinking of the requirement, as a whole, of acceptance and actual receipt, as both were in question in the case, and he seems to have been of opinion that the statute could be satisfied in these respects, although the lien continued. But this opinion must be taken with a grain of salt. In Mr. Benjamin's book he had two paragraphs on this subject that

seemed to flatly contradict each other, sec. 187 and sec. 801. In the former he quoted Holroyd, J., in *Baldey v. Parker*, that, "so long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute," adding that, "No exception is known in the whole series of decisions to the propositions here enunciated, and it is safe to assume as a general rule that whenever no fact has been proven showing an abandonment by the vendor of his lien, no actual receipt by the purchaser has taken place." In section 801, after referring to the impression of Mr. Smith in his learned treatise on mercantile law, to the effect that the same acts which have been held sufficient under the Statute of Frauds to constitute an actual receipt by the purchaser would, if done with respect to the whole of the goods, have the like effect in determining the vendor's lien and justifying an action for goods sold and delivered, he adds these words: "But we have seen in a preceding chapter that in cases where the vendor retains possession of the chattel in the changed character of bailee for the buyer, there is a clear distinction between such a delivery as would suffice under the Statute of Frauds and a delivery sufficient to divest the vendor's lien." Possibly the qualification in the first paragraph contained in the words, "as a general thing," was meant to let in the exceptional case referred to in the same paragraph, although they are used almost immediately after he has stated that no exception is known in the whole series of cases to the proposition stated in the earlier paragraph. Mr. Benjamin, however, is wrong in saying that there is no exception. In *Wright v. Percival*, 8 L. T. N. S. Q. B. 258, it was held that there had been actual receipt, and yet that the lien of the vendor was not gone. Patteson, J., had put it to the jury that there could be no receipt unless the lien was gone, but at the argument of the rule nisi, he said: "I cannot exactly recollect what I said at the trial, but if I put it to the jury that there could be no delivery because the plaintiff had not parted with his lien, I was wrong, and the jury found a verdict in spite of my misdirection." Williams, J., said that the fact of a lien being reserved was not a complete criterion

of acceptance, (meaning, of course, receipt). "It is a circumstance, but not a governing feature of the case. In *Elmore v. Stone* the delivery was complete. The case was the same as if the horses had been put into the defendant's own stables. But was *Elmore* compelled to part with the horses until he had got the price of them? Clearly not. Well, now, that shows that the lien is not a perfect test, because the lien was not parted with, although there was a full delivery. In this case, also, there was a complete delivery." The case of *Elmore v. Stone* is referred to in the text (Ante, p. 29). It will have been observed that Mansfield, C.J., who decided the case, held that the lien was gone in *Elmore v. Stone*, and Parke, B., in *Holmes v. Hoskins*, 9 Exch. 753, referring to *Elmore v. Stone*, says that the lien was gone. The cases referred to by Mr. Benjamin as showing that the vendor's retention of his lien may be consistent with the actual receipt by purchaser, seem to be *Townley v. Crump*, 4 A. & E. 58, and *Dodsley v. Varley*, 12 A. & E. 632. The first of these was a case of insolvency and stoppage *ante transitum*. The second was put on the ground of a special interest, sometimes, but improperly, called a lien, and the case is explained by Mr. Benjamin in section 188 as resting on peculiar grounds, for he there says: "It is plain that there is nothing in this case which conflicts with the rule that there can be no actual receipt by the purchaser while the vendor's lien continues, for the court held that the lien was gone." Referring to this case and another, Mr. Langdell says that. "*Dodsley v. Varley* and *Wright v. Percival*, so far as they hold that there may be an actual receipt without the vendor's losing his lien for the price must be considered as overruled." Mr. Langdell considers that in *Elmore v. Stone*, the lien was gone, saying that, "though the goods may be in the possession of the seller at the time of the bargain, the possession may be changed by his becoming bailee of the buyer, and holding the goods in that character. But as the effect of such a change in the character in which the seller holds the goods is to deprive him of his lien for the price, very clear evidence should be required that such was his intention." Langdell's Select Cases on Sales, Index, p. 1203.

There can be little doubt that this is the law, where the Sale of Goods Act is not in force. By section 41 (2) of that Act, it is enacted that "the seller may exercise his right of lien, notwithstanding that he is in possession of the goods as agent or bailee or custodian of the buyer."

A case from the Northwest Territories should be considered in connection with this discussion, *Livingstone v. Colpitts*, 4 Terr. L. R. 441. In an action for the price of forty-three head of horses at \$23 per head the evidence established that the plaintiff and defendant drove to the plaintiff's ranch and saw the plaintiff's bunch of horses, that the defendant specified such horses as were unsuitable for his purpose, which were thereupon marked and separated from the others; that the defendant gave the plaintiff \$3 with which to purchase oats to feed the horses, and also bought and gave the plaintiff some rope with which to make halters for the horses; but that the horses never left the possession of the plaintiff. It was held, reversing the decision of Rouleau, J., that although there had possibly been sufficient acceptance there had been no actual receipt. The judgment of Rouleau, J., was largely based on the consideration that it was very improbable that the defendant was supplying money to buy oats for horses that he did not own, and he concluded that the horses had been delivered. The court *in banco* could not see that the owner who had agreed to sell had ever changed his position or become bailee to the purchaser. He was to keep the horses till paid for, and had never lost his lien. "Could the defendant have by right taken away any of these horses without payment? No, for plaintiff himself says he was to keep them till payment. The plaintiff having failed to prove any actual receipt, he failed to establish a contract binding under section 6 of the Sales of Goods Act."

Although the Statute of Frauds is not satisfied, the sale is valid, and transfers the property. In *Burton et al. v. Bellhouse*, 20, U. C. Q. B. 60 (1860), there was a verbal agreement for the purchase of two locomotives for \$16,000. They were unfinished at the time of the agreement. Later, by a deed reciting the verbal agreement, the locomotives were conveyed to the plaintiffs. The plaintiffs insured the locomotives as their property, and the jury found that there

had been a bona-fide transaction. The Court of Queen's Bench held that there had been a transfer of the property by the verbal agreement: "It is true that the agreement " in September, 1858, was a verbal agreement, but this is " not an action to charge the plaintiffs or defendant upon " a contract for the sale of a chattel. It is a question raised " upon the fact of a sale having been accomplished, and " that a sale may be perfected by verbal agreement, as well " as by writing cannot be doubted." This is in line with what was said by Bigham, J., in *Taylor v. Great Eastern Railway*, 1901, 1 K. B., at 779 (1907): "I think that the " absence of a memorandum in writing, and of the other " conditions mentioned in sec. 4, sub-sec. 1, of the Sale of " Goods Act" (section 17 of the Statute of Frauds) " does not make a contract void, or even voidable. The " contract is good. The only effect of the non-fulfilment of " the statutory conditions is that it is unenforceable. And, " the contract being good, all the legal consequences of a " contract follow; so that if the contract is for the sale of " specific goods, the property in the goods passes to the " buyer." What happens if the buyer refuses to pay for the goods is considered in the remarks immediately following those quoted.

The case of *Kent v. Ellis*, 31 S. C. R., 110, seems opposed to the view of the Statute of Frauds above presented. This was not an action brought on a contract of sale, but an action for conversion of the property in which the defendant was setting up that the property was not that of the plaintiff, but of a third party named in the pleading. The Supreme Court held, affirming the judgment of the Supreme Court of Nova Scotia, that the plaintiff must prove an unquestionable title in himself, and "if it appears that " such title is based on a contract, the defendant may successfully urge that such contract is void under the " Statute of Frauds, though no such defence is pleaded."

Statute of frauds need not be pleaded except where a party to contract of sale is seeking to enforce it. As Ritchie, J., pointed out in the case above cited, the plaintiff's title may be derived from any one of a number of sources, and it is impossible for the defendant to anticipate the nature of the title to be set up. If it should happen to be a sale, the

defendant cannot be expected to plead the Statute of Frauds as a ground of invalidity. In the case in which these remarks were made (*Kent v. Archibald*), Gwynne, J., said in the Supreme Court of Canada: "All the cases which have been cited before us show that where the defendant was bound to plead the Statute of Frauds, it was in cases between the parties to the contract, where one of the parties was seeking to enforce the contract against the other, and the language of Lord Blackburn in *Maddison v. Alderson*, 8 App. Cases, 488, shows that it is in relation to a case instituted by one of the parties to a contract against the other to enforce the contract he is speaking when he says that a defendant must plead the statute. . . . This cannot apply to the case of a defendant in an action for the conversion of the goods, where title to the goods is the point in issue, in which action the defendant has nothing to do but to insist upon the plaintiff showing a good title *in omnibus* as against the defendant."

Delivery to carrier, followed by acceptance of part, gives purchaser right of action on contract of carriage, under Mercantile Amendment Act. Quaere as to losses before acceptance. In *Friendly v. The Canada Transit Co.*, 10 O. R. 756 (1886), one Lowry gave an order for three cases of goods, exceeding forty dollars in value, which were shipped consigned to him, and were carried by railway and thence by defendants' steamer to Michipicoten River. While the steamer was discharging cargo, one of the cases slipped from the gangway into the water; another was landed in safety, and the third remained on board, because the purser refused to deliver it until the freight, not only on the three cases, but on some other goods consigned to Lowry, was paid. The steamer left with the goods on board, and the case so remaining on board was lost. The action was against the carrier for the case that fell overboard and the one that was lost with the steamer. It was held that there had been an acceptance and actual receipt of the goods, which had therefore become the property of the purchaser, who had, under the Mercantile Amendment Act, R. S. O., ch. 116, sec. 5, sub-sec. 1, the right to bring the action, which had been wrongly brought by the con-

signor. The case of *Coombes v. Bristol and Exeter Railway*, 3 H. & N. 510, had decided that the consignee had no property in the goods where there had been no acceptance before the shipment, and nothing thereafter but the delivery to the carrier, inasmuch as the carrier, although the agent of the buyer to receive, had no power to accept, and Galt, J., dissented in the present case because he could not distinguish it from *Coombes v. Bristol and Exeter Railway Co.* But there had clearly been an acceptance here of one of the cases, which undoubtedly made the contract of sale enforceable for the whole consignment, and even as to the case that fell overboard, it was recovered and accepted under a settlement with the vendor for the depreciation in value. The point is not dealt with in the judgment that, as to this case, the statute had not been satisfied at the time when the goods were lost; but Cameron, C.J., said, in the later and somewhat similar case of *Langdon v. Robertson*, 13 O. R. 497 (1886), "As far as I am concerned, the case of *Friendly v. Canada Transit Co.* precludes me from holding otherwise" (than that plaintiffs were the owners of the goods) "as in that case I held that, by the acceptance of the goods, the property became vested in the purchaser from the time of their delivery to the carrier, and whatever right of action the seller had under the bill of lading in respect of the goods up to the time of acceptance passed upon acceptance, to him." The learned Chief Justice seems here to hold that the subsequent acceptance has a relation backwards to the time of delivery; but it is more probable that his attention was not at the moment directed to the fact of some of the goods having been lost before the acceptance which made the contract enforceable.

It has not yet been suggested in any case that there may be a necessity for reconsidering the question in *Coombes v. Bristol and Exeter Railway Co.*, under the more modern views as to the effect of the Statute of Frauds. In *Taylor v. Great Eastern Railway*, 1901, 1 K. B., at 778, Bigham, J., said "I think that the absence of a memorandum in writing, and of the other conditions mentioned in sec. 4, sub-sec. 1 of the Sale of Goods Act, does not make a contract void, or even voidable. The contract is good. The only effect of the non-fulfilment of the statutory

“ conditions is that it is unenforceable. And the contract
“ being good, all the legal consequences of a contract
“ follow; so that, if the contract is for the sale of specific
“ goods, the property in the goods passes to the buyer.”
Assuming the correctness of this view, and the similarity
of the provisions of the Sale of Goods Act to those of the
Statute of Frauds, which it was intended to follow, the
effect would be that the property in the whalebone in
Coombes v. Bristol and Exeter Railway Co., passed to
the purchaser on shipment, and he would have the right
to bring the action against the carrier.

CHAPTER III.

THE SECOND EXCEPTION.

THE second exception, viz., [unless the buyer] "give something in earnest to bind the contract (a) or in part payment," need not detain us long. The words have in practice been found so intelligible that there are very few cases in which any decision on the meaning of this clause is reported. "Earnest" is some tangible token or gift, which need not be in money, given or actually transferred by the buyer to the seller to mark the conclusion of the bargain (b). In *Blenkinsop v. Clayton* (c), in 1817, the buyer drew a shilling across the seller's hand, and put it in his own pocket to strike the bargain, and the Court of Common Pleas thought that he had not given anything in earnest.

In *Sumner and Leivesley v. John Brown & Co.* (d), in 1909, where the defendants sent empty bags to be filled with potatoes on account of the contract, and relied on the sending of the bags as an earnest to bind the contract, it was held that, as the bags were merely sent to facilitate the performance of the contract, they could not be regarded as an earnest given to bind it.

It need only be observed, that there cannot be any payment unless it is accepted as well as given as payment.

In *Walker v. Nussey* (e), in 1847, on a sale of goods, the buyer and seller agreed that a debt which the seller owed to the buyer should be set off in part payment. The jury found a verdict for the defendant, and on the motion a new trial was refused, Parke, B., saying, "no evidence was given of

(a) The word "bargain" was used in the 17th section of the Statute of Frauds, and consequently is so referred to in cases prior to the Sale of Goods Act, 1893.

(b) See *Howe v. Smith* (1884), 27 C. D. pp. 101, 102.

(c) *Blenkinsop v. Clayton*, 7 Taunt. 597. See also *Bach v. Owen*, 5 T. R. 409; *Goodall v. Skelton*, 2 H. Bl. 316.

(d) *Sumner and Leivesley v. John Brown & Co.*, 25 T. L. R. 744.

(e) *Walker v. Nussey*, 16 L. J. Ex. 120; 16 M. & W. 302.

"the actual payment or discharge of the debt due from the plaintiff (the seller), so that all rested in the agreement "merely" (a). In *Norton v. Davison* (b), in 1899, it was held that an over-payment on a previous bargain did not constitute part payment within the meaning of the 4th section.

In order to take the case out of the statute by a part payment, it is probably not essential that the part payment should be in money (c).

(a) See *Hooper v. Stephens*, in 1835, 4 Ad. & El. 71; and *Hughes v. Paramore*, in 1855, 24 L. J. Ch. 681; 7 De G. M. & G. 229.

(b) *Norton v. Davison*, 68 L. J. Q. B. 265; [1899] 1 Q. B. 401.

(c) See the remarks of Erle, J., in *The Queen v. St. Michaels*, in 1856, 25 L. J. Q. B. 379; 6 E. & B. 819; and *Hart v. Nash*, 2 Cr. Mee. & R. 337.

CHAPTER IV.

THE THIRD EXCEPTION.

What is a sufficient memorandum, p. 54.

What is a sufficient signature, p. 70.

Who is an agent authorized to sign, p. 76.

THE third exception, "or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf," is probably that which would be most apt to mislead a person not acquainted with the decisions. It is to be observed that the Act does not interfere with the rules of evidence applicable to written testimony (a). A signed note or memorandum of the contract is one way of making the contract good, but the legal effect of such a note or memorandum upon the proof of the contract is left entirely as it was at common law. It is perfectly competent for persons who are entering into any agreement either to have the whole terms of it reduced into writing, or to make their agreement with reference to some previously existing writing, and if they do so, whether the writing be signed or not, the parties must be bound by its contents; they are not allowed by the law to show that there was a mistake, and that they intended to agree to something different from what is stated in the writing, for the very object of agreeing to a writing is to prevent disputes about what they intended; this rule of law is very inflexible. If the parties have expressed their assent to the reduction of

(a) It would be too much of a digression to attempt to state with precision the laws of evidence relating to written contracts, but so much of the construction of this section depends on a knowledge of that law, that it seems proper to try to state the leading principles of it, though without attempting to give the qualifications necessary to render such a statement accurate and without attempting to collect the authorities.

the whole contract to writing, they are in general prohibited from adding anything to the terms expressed in the writing: this is to be understood of terms that require an agreement between the parties, for where the terms reduced to writing are such that a legal duty would result, that legal duty is added to the terms of the contract. To this last rule, however, there is a wide class of exceptions, arising from local customs and the usage of particular trades.

Parke, B., said in *Hutton v. Warren* (a), in 1836: "It has long been settled, that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. . . . And this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to these known usages."

There is no rule of law to prohibit the parties from making an agreement part only of which is to be proved by writing. If the parties say in substance, "We agree to the terms contained in such a writing, with the exceptions and additions which at such a time were agreed upon by word of mouth," there is no legal objection to this (b). Parol evidence may be used to show what the exceptions and additions are; the writing is conclusive as to the rest.

When either the part or the whole of an agreement is thus reduced to writing, the agreement cannot (in general) be proved by any other means than by showing what the contents of the writing are, so that independently of any statute the writing is a necessary part of his case who seeks to prove the agreement. But if the terms are put in writing, but not as a matter of compact between the parties to settle what the terms are, the case is different. If the writing is made by a bystander, without any authority from the parties, the writing is not evidence at all, though it may be used to refresh the memory of him who made it. If one of the parties

(a) *Hutton v. Warren*, 1 M. & W. 475.

(b) Sale of Goods Act, s. 3.

only authorized the making of the memorandum, or afterwards admitted its accuracy, it is evidence against him as an admission, but not in law either indispensably necessary for the proof of the contract, or conclusively binding upon him against whom it is evidence.

Now the Sale of Goods Act leaves this law quite as it was before. If the contract, or part of it, is in writing, the writing must be proved, though there has been a part payment or a part acceptance and receipt; and if the writing is a part of the agreement, it must be proved, though it would not satisfy the third exception, either because it is not signed, or for any other reason. And the writing, when proved, has just as much effect in settling conclusively what the terms of the bargain are as it would have had if the Sale of Goods Act had never been passed. The proof of the writing is as indispensable and as conclusive in a contract for the sale of goods for more than 10*l.* as in one for the sale of goods for less than 10*l.*, and not more so. And when a party has signed a memorandum of the terms of the contract, which is not more than an admission of the terms of the contract, the other party is not forced to use this evidence, if he can in any other way satisfy the exceptions in the section, and if he does use it the memorandum does not bind the other party more than a similar admission would have done if the price had been less than 10*l.* It is strong evidence of what the agreement is, but it is not the agreement itself. It may make the contract good, because it is in writing and signed, and for the same reason it is capable of clear and undeniable proof, but its effect in settling the terms of the contract is no greater than that of a similar admission made by word of mouth.

In *Ford v. Yates* (a), in 1841, there was a memorandum which the Court treated (erroneously) as a sufficient memorandum of the contract to take the case out of the Statute of Frauds. In it the price was mentioned, but nothing was said about the time of payment. The Court was of opinion that the legal effect of the written contract was a sale for ready

(a) *Ford v. Yates*, 2 M. & Gr. 549; 2 Scott, N. R. 645.

money, and, therefore, that evidence to show that it was a sale on credit was inadmissible.

But in *Lockett v. Nicklin* (a), in 1848, the plaintiff seems to have relied on the acceptance and receipt to take the case out of the statute, and he then put in a letter from the defendant to prove some of the terms of the contract, and gave parol evidence on a point on which the letter was silent; and the Court held that such evidence was admissible (b).

In *Moore v. Campbell* (c), in 1854, the plaintiff employed Wilks, a broker, to purchase hemp. Wilks agreed with the defendant to buy it from him, and sent him a note. The defendant drew up and signed another note differing in several respects from Wilks'. The hemp when landed was sold by the defendant in consequence of a difference between him and the plaintiff as to the quantity, and this action was brought on the note drawn up by the defendant, for damages for not delivering. It was argued for the defendant that, as the bought and sold notes differed, there was no contract. At the trial the Judge ordered a verdict for the plaintiff, subject to the opinion of the Court on this point. On the motion Parke, B., delivering the judgment of the Court granting a new trial, said that Wilks had acted not as a broker, but solely as the agent of the plaintiff, and that it was for a jury to say whether both parties intended the defendant's note to be the contract between them, and if so, it would be a sufficient memorandum. But if the defendant never intended to be bound unless the plaintiff was bound also, then there was no contract.

In *Gibson v. Holland* (d), in 1865, the defendant authorized his agent Rookes to buy a horse from the plaintiffs. Rookes bought it, and then followed a correspondence between him and the defendant, in which the terms of the bargain appeared. The defendant relied on the objection that the memorandum passed, not between the contracting parties, but

(a) *Lockett v. Nicklin*, 19 L. J. Ex. 403; 2 Ex. 93.

(b) See also *Eden v. Blake*, in 1845, 14 L. J. Ex. 194; 13 M. & W. 614.

(c) *Moore v. Campbell*, 26 L. J. Ex. 310; 10 Ex. 323.

(d) *Gibson v. Holland*, 35 L. J. C. P. 5; L. R. 1 C. P. 1.

between one of those parties and his own agent. But the Court held that the memorandum was sufficient on the ground that the statute did not make it necessary that the memorandum should be addressed to the person who was to take advantage of it. In *In re Hoyle*, in 1893 (a), Bowen, L. J., said, "The Court is not in quest of the intention of parties, but only of evidence under the hand of one of the parties to the contract that he has entered into it. Any document signed by him and containing the terms of the contract is sufficient for that purpose"; and A. L. Smith, L. J. (b), in the same case said, "A letter to a third party has been held to be enough; an affidavit made in a different matter has been held to suffice; and I should say that an entry in a man's own diary, if it were signed by him and the contents were sufficient, would do."

Parke, B., in *Bill v. Bament* (c), said he was clearly of opinion that the memorandum must be in existence at the time when the action is brought. In that case it had been signed three days afterwards.

To return to the section. There are three subjects of inquiry:—1stly, What is "a note or memorandum in writing of the contract"? 2ndly, What is meant by being "signed by the party to be charged"? 3rdly, Who is "his agent in that behalf"?

Now, as to what is a note or memorandum of the contract, it is to be observed that by the express words of the section it is to be *in writing*, and it has been held, that this means that the writing must contain in itself sufficient matter to amount to the note or memorandum, without calling in any parol testimony to supply the deficiency. If the very paper signed contains in itself the whole that is reduced to writing, the only question is, whether that is sufficient matter to constitute a memorandum of the contract; but if there be sufficient matter to make a memorandum written on separate pieces of paper, no one of which by itself contains enough,

(a) *In re Hoyle*, 62 L. J. Ch. 182; [1893] 1 Ch. 84, C. A., at p. 99.

(b) [1893] 1 Ch. 84, at p. 100.

(c) *Bill v. Bament*, in 1841, 9 M. & W. 40.

the question arises, if the memorandum of which the contents of these several papers are evidence is *all* in writing or not; if the contents of the signed paper themselves make reference to the others so as to show by internal evidence that the papers refer to each other, they may be all taken together as one memorandum in writing; but if it is necessary, in order to connect them, to give evidence of the intention of the parties that they should be connected, shown by circumstances not apparent on the face of the writings, the memorandum is not all in writing, for it consists partly of the contents of the writings and partly of the expression of an intention to unite them, and that expression is not in writing (*a*). If, indeed, the separate papers were at the time of the signature attached to each other, they then in substance formed one paper, and a subsequent separation of them cannot prevent the memorandum from having once existed.

In *Hinde v. Whitehouse* (*b*), in 1806, the sale was by auction, subject to certain conditions; a paper containing the conditions was read by the auctioneer and then laid on his desk; he wrote down the buyer's name opposite the lots in his catalogue, which was headed "To be sold by auction, "for particulars apply to Thomas Hinde," but contained no internal reference to the conditions. The King's Bench held that the bargain was contained in the conditions, and that there was no signed memorandum of the bargain; that which there was, Lord Ellenborough said, was a minute made on the catalogue of sale which was not annexed to the conditions of sale, nor had any internal reference to them by context or the like. "I am therefore of opinion," he said, "that "the mere writing on the catalogue, not being by any "reference incorporated with the conditions of sale, is not "a memorandum of a bargain under those conditions of "sale."

Precisely the same case came before the King's Bench, in

(*a*) This statement was approved by Williams, J., in *North Stafford Railway Co. v. Peek*, in 1860, E. B. & E. 1001.

(*b*) *Hinde v. Whitehouse*, 7 East, 558.

1824, in *Kenworthy v. Schofield* (a), and was decided the same way. Holroyd, J., there said, "It appears to me that you cannot call that a memorandum of a bargain which does not contain the terms of it. The argument for the plaintiff is, that the conditions, being in the room, were virtually attached to the catalogue; but I think as they were not actually attached or clearly referred to, they formed no part of the thing signed. In the case put of the separation of the conditions from the catalogue, during the progress of the sale, I should say, that the signatures to the latter made after the separation were unavailing. It occurred to me at first that this might be likened to a will, consisting of several detached sheets, when a signature of the last, the whole being on the table at the time, would be considered a signing of the whole, but there the sheet signed is a part of the whole. Here the catalogue was altogether independent of the conditions."

In *Boydell v. Drummond* (b), in 1809, the defendant had put his name into a list of subscribers to a publication, but there was nothing to connect this list with the prospectus which contained the conditions of sale; the Judges were of opinion that there was no memorandum. The case was, however, decided on another point.

In *Sarl v. Bourdillon* (c), in 1856, the things bought, and the prices, were entered in the seller's order book, and the entry was signed by the buyer. The seller's name was written on the fly-leaf at the beginning of the book. One of the articles was to be altered, and payment was to be by a draft, and the memorandum made no mention of this, but the memorandum was held sufficient.

In *Peirce v. Corf* (d), in 1874, there was a sale of a horse at an auction, but the memorandum of the sale was not attached to the conditions nor made any reference to them:

(a) *Kenworthy v. Schofield*, 2 B. & C. 945.

(b) *Boydell v. Drummond*, 11 East, 142.

(c) *Sarl v. Bourdillon*, 26 L. J. C. P. 78; 1 C. B. N. S. 188.

(d) *Peirce v. Corf*, 43 L. J. Q. B. 52; L. R. 9 Q. B. 210.

held that section 17 of the Statute of Frauds was not satisfied (a).

In *Taylor v. Smith* (b), in 1893, the defendant orally agreed to purchase from the plaintiffs a quantity of spruce deals, and an invoice for the deals was sent to the defendant by the plaintiffs. An advice note, mentioning the quantity of deals, but stating no price and referring to no other document, was also sent to the plaintiffs as consignors. The defendant inspected the goods, and subsequently wrote across the advice note, and signed, the following memorandum: "Rejected—not according to representation." He also wrote a letter to the plaintiffs rejecting the goods. It was held, by the Court of Appeal, that the advice note, the indorsed memorandum, and the letter did not constitute a sufficient memorandum, as the terms of the bargain were not to be found in them, and they did not refer to nor incorporate the invoice.

In *Pearce v. Gardner* (c), in 1897, the writing relied on by the plaintiff (the buyer) was a letter signed by the defendant (the seller), and addressed "Dear Sir," but not containing on the face of it the name of the plaintiff, or any words identifying him. At the trial the plaintiff proved that he had received the letter by post in an envelope addressed to him, and it was held, by the Court of Appeal, that as the envelope and the letter within it were sent together, and might be taken together, the effect was the same as if the name of the plaintiff had been written at the foot or indorsed on the letter, and that there was a sufficient memorandum.

These cases are strong decisions to show that no intention on the part of the signer to unite two papers will suffice, unless the papers be physically joined, or that intention appear on the face of the papers; but the question of what shall be a sufficient reference of the one paper to another, is a very difficult one. It is not possible to use language so

(a) See also *Rishton v. Whatmore*, in 1878, 47 L. J. Ch. 629; 8 Ch. D. 467; *Studds v. Watson*, 28 Ch. D. 305.

(b) *Taylor v. Smith*, 61 L. J. Q. B. 331; [1893] 2 Q. B. 65.

(c) *Pearce v. Gardner*, 66 L. J. Q. B. 457; [1897] 1 Q. B. 688.

clear and explicit that the meaning may not vary according to the circumstances under which it is used; when, therefore, it appears on the face of a writing that it refers to something extraneous, there must in every case be some inquiry into external circumstances to see what it is that is referred to. The Sale of Goods Act makes no alteration in this. Precisely the same evidence is admissible to show what the writing refers to when it is a memorandum of a bargain within the Act, that would be admissible to explain it, if it were a memorandum of a bargain not within the Act; but when it is ascertained to what the writing refers, the Act steps in. If the reference is to something verbal, or ultimately to a writing by the medium of something verbal, the common law would take the whole together as showing what the contract is, but as one link of the evidence is not in writing, it will not in general operate as a memorandum *in writing* to take the case out of the Act.

It would therefore be necessary for a clear exposition of this part of the subject to enter into the whole question of how far external evidence is by common law admissible to aid the construction and application of writings; but that is too extensive and difficult a subject for a digression. The general rule seems to be, that all facts are admissible which tend to show the sense the words bear with reference to the surrounding circumstances concerning which the words were used (*a*), but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected (*b*).

(a) See *Macdonald v. Longbottom*, 29 L. J. Q. B. 256; 1 E. & E. 977, in 1859; where parol evidence was admitted to show that "your" wool meant wool which the plaintiff had purchased, as well as that which he had clipped from his own sheep; and *Spicer v. Cooper*, 1 Q. B. 424, in 1841. "If there are peculiar expressions used in a contract, which have in particular places or trades a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the Court to decide what the meaning of the contract was." Per Parke, B., in *Hutchinson v. Bowker*, 5 M. & W. 542. See also *Shardlow v. Cotterell*, 51 L. J. Ch. 153; (1881), 20 Ch. D. 90; *Plant v. Bourne*, 66 L. J. Ch. 643; [1897] 2 Ch. 281; *Bank of New Zealand v. Simpson*, [1900] A. C. 182.

(b) See Wigram on Extrinsic Evidence. The principles of the rules of law regulating the admissibility of extrinsic evidence to aid in the construction of

The cases reported as to what was a sufficient reference of documents to each other to form a memorandum within the 17th section are few, and do not afford much assistance.

In *Saunderson v. Jackson (a)*, in 1800, there was a bill of parcels delivered at the time of the bargain which was in itself a sufficient memorandum, but there was some doubt whether it was signed by the defendants. The Court of Common Pleas thought it was sufficiently signed, but that, even if it was not, the defect was supplied by this letter addressed to the plaintiff, and signed by the defendants:—
 “Sir, we wish to know what time we shall send you a part of
 “your order, and shall be obliged for a little time in delivery
 “of the remainder; must request you to return our pipes. We
 “are, &c.”

Lord Eldon, C. J., said, in delivering the judgment of the Court, “Although it be admitted that the letter which does
 “not state the terms of the agreement would not alone have
 “been sufficient, yet, as the jury have connected it with
 “something which does, and the letter is signed by the
 “defendants, there is then a written note or memorandum of
 “the order which was originally given by the plaintiff, signed
 “by the defendants.” It is a great pity that the report does not more fully state what were the facts which Lord Eldon allowed to go to the jury, as evidence to enable them to connect the letter with the bill of parcels.

In *Johnson v. Dodgson (b)*, in the Exchequer in 1837, there had been a written memorandum made by the defendant, the buyer, in his own book and signed by the plaintiffs’

wills and of contracts required to be in writing seem to be the same. But in applying them, it seems necessary to bear in mind, that there is a distinction between the two classes of instruments. The will is the language of the testator soliloquizing, if one may use the phrase, and the Court in construing his language may properly take into account all that he knew at the time in order to see in what sense the words were used. But the language used in a contract is the language used to another in the course of an isolated transaction, and the words must take their meaning from those things of and concerning which they are used, and those only. This does not affect the law, but it is of some consequence in the application of it, as it narrows the field of inquiry.

(a) *Saunderson v. Jackson*, 2 B. & P. 238.

(b) *Johnson v. Dodgson*, 2 M. & W. 653.

agent as follows:—"Sold John Dodgson 27 pockets Playstead 1836, Sussex, at 103s. The bulk to answer the sample. 4 pockets Selme Beckleys, at 95s. ; samples and invoices to be sent per Rockingham Coach : payment in bankers at two months. Leeds, 19th October, 1836." There was a doubt whether this was signed by the defendant, and the plaintiffs to meet that doubt proved the following letter from the defendant to them :—

"LEEDS, WEDNESDAY EVENING,
"19th October, 1836.

"GENTLEMEN,

"Please to deliver the 27 pockets Playstead and the 4 pockets Selmes 1836, Sussex, to Mr. Robert Pearson or bearer to be carted to Stanton's Wharf : 20 pockets of Playstead to be forwarded per first ship and the remaining eleven pockets per the second ship and you will oblige gentlemen your most obedient

"JOHN DODGSON."

The Court were unanimously of opinion that the first paper was signed by the defendant, which disposed of the case notwithstanding the fact of his keeping it was a clear indication that he never intended it as a voucher of his being bound, but only to bind the other party (a) ; but Lord Abinger said, "If it depended on the recognition of the contract by the letter, there might be some doubt, though even upon that I should have thought the reference to the only contract proved in the case sufficient." Parke, B., said, "If the question turned on the recognition by the subsequent letter, I own I should have had very considerable doubt whether it referred sufficiently to the contract. It refers to the subject-matter, but not to the specific contract" (b).

In *Allen v. Bennet* (c), in 1810, there was a contract note defective from not giving the name of the buyer ; there was also a correspondence between the parties which is not set out in the report. It appears, however, to have shown

(a) *Per Blackburn, J.*, in *Durrell v. Evans*, 31 L. J. Ex. 337 ; 1 H. & C. 191.

(b) See also *Archer v. Baynes*, 20 L. J. Ex. 54 ; 5 Ex. 625, in 1850.

(c) *Allen v. Bennet*, 3 Taunt. 169.

that there was a contract of sale of some sort between the parties concerning goods of the same sort as those mentioned in the contract note, and to have been in itself defective as a memorandum, and to have made no specific allusion to the contract note. The Common Pleas held that the correspondence was sufficiently connected with the note, and supplied its deficiencies.

In *Buxton v. Rust* (a), in 1872, the buyer handed to the seller a memorandum of the terms of the bargain. The seller did not sign it, and some time afterwards wrote to the buyer saying that he should "consider the deal off, as you "have not completed your part of the contract." The buyer then asked for a copy of the memorandum, which the seller enclosed in a letter signed by him. Held, that these letters and enclosures were sufficiently connected to form a memorandum.

Jackson v. Lowe (b), *Cooper v. Smith* (c), *Richards v. Porter* (d), *Smith v. Surman* (e), are cases which turn upon the sufficiency or not of what was written, and not upon the circumstance of its being contained in different documents.

What is a sufficient memorandum.

Supposing the writing to be all on one paper, or on papers sufficiently connected, the question arises whether there is sufficient matter to form a note or memorandum of the contract. It was decided in *Wain v. Warlters* (f), in 1804, that a writing could not be a memorandum of an agreement within the *fourth* section of the Statute of Frauds unless it contained the whole agreement, that is to say, the parties

(a) *Buxton v. Rust*, 41 L. J. Ex. 1, and 173; L. R. 7 Ex. 1, and 279. See also *Bauman v. Jones*, 3 Ch. Ap. 508; *Long v. Miller*, 4 C. P. D. 450; *Care v. Hustings*, 7 Q. B. D. 125; *Bonnewell v. Jenkins*, 8 Ch. D. 70.

(b) *Jackson v. Lowe*, 1 Bing. 9.

(c) *Cooper v. Smith*, 15 East, 103.

(d) *Richards v. Porter*, 6 B. & C. 437.

(e) *Smith v. Surman*, 9 B. & C. 561.

(f) *Wain v. Warlters*, 5 East, 10; *Price v. Richardson*, 15 L. J. Ex. 345; 15 M. & W. 539.

and the consideration and the subject-matter as well as the promise.

The words in the 17th section of the Statute of Frauds were substantially the same as those in the fourth, except that the word "bargain" was used instead of the word "agreement." The two words seem to be very much alike in their meaning; indeed, so long as the property in the goods is not transferred, a contract for the sale of goods is more technically and accurately called an agreement than a bargain; but the difference in the words should be observed, as it has been twice said by learned Judges, that it might make a difference in the construction of the section.

It is necessary that the memorandum should disclose who the person is with whom the contract is made, as well as the person to be charged by it, otherwise it is no memorandum of the bargain or contract.

This seems to have been first decided in *Champion v. Plummer* (a), in the Common Pleas in 1805. In that case, the plaintiff's clerk, at the time of a verbal bargain, wrote an entry in the following words:—"Bought of W. Plummer 20 "puncheons of treacle, 37l. 10s., to be delivered by 10th "December." Plummer then signed it. The Common Pleas held that this would not make the contract good as against Plummer. Sir J. Mansfield, C. J., said, "How can that be said "to be a memorandum of a contract which does not state who "are the contracting parties? By this note it does not at all "appear to whom the goods were sold" (b).

In *Allen v. Bennet* (c), in 1810, the defendant's agent wrote in a book belonging to the plaintiff, Allen, the following entry:—"Ordered of H. and G. Bennet, Liverpool, 50 "barrels fine new rice, 3l., 2 months, and 2 months as per "sample in running numbers," and signed it on the defendant's (Bennet's) behalf. The name of the plaintiff, Allen, did not appear in the book, except in one place, where it had been

(a) *Champion v. Plummer*, 1 N. B. 252.

(b) See also *Williams v. Lake*, 29 L. J. Q. B. 1; 2 E. & E. 349.

(c) *Allen v. Bennet*, 3 Taunt. 169.

again struck out. The Common Pleas considered this a defective memorandum, but that the deficiency was supplied by other documents (a).

In *Cooper v. Smith* (b), in 1812, before the King's Bench, the entry was made by the plaintiff's agent in a book; it mentioned the defendant's name. The Court inquired particularly whether the plaintiff's name appeared anywhere in the book; it did not; but the memorandum was not signed by an agent for the defendant, and, perhaps, the decision turned more upon that than on the absence of the plaintiff's name.

In *Jacob v. Kirke* (c), in 1839, the entry was in a book of the plaintiff's in the following terms:—"Mr. Kirke, 6 dozen kings, 6 dozen queens, at 25s. per lb., 2 dozen others at 20s. per lb., to Russell Street, Manchester;" it was signed by Kirke, but Jacob's name nowhere appeared in the book. Parke, J., at *Nisi Prius*, thought the objection under the Statute of Frauds insurmountable, but the case went off on another point.

In *Graham v. Musson* (d), in 1839, the plaintiff's traveller, Dyson, sold some sugar to the defendant, and made an entry in the defendant's book which he signed with his own name, Dyson. There was no evidence that Dyson was authorized to act as the defendant's agent, and the Court held that the plaintiff could not recover.

In *Vandenbergh v. Spooner* (e), in 1866, the defendant signed this memorandum:—"D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenbergh, now lying at Lyme Cobb, at 1s. per foot." Held that this was not a sufficient memorandum. As Bramwell, B., put it, "The seller's name as seller is not mentioned in it, but occurs only as part of the description of the goods."

(a) See also *Sarl v. Bourdillon*, 26 L. J. C. P. 78; 1 C. B. N. S. 188; *ante*, p. 49.

(b) *Cooper v. Smith*, 15 East, 103.

(c) *Jacob v. Kirke*, 2 M. & R. 222.

(d) *Graham v. Musson*, 5 Bing. N. C. 603. See also *Graham v. Fretwell*, in 1841, 3 M. & G. 368.

(e) *Vandenbergh v. Spooner*, 35 L. J. Ex. 201; L. R. 1 Ex. 316.

In *Newell v. Radford* (a), in 1867, which was an action for not delivering, the memorandum was "Mr. Newell, 32 sacks culasses at 39s., 280 lbs., to await orders. June 8. John Williams." Williams was the defendant's agent, and it was said for the defendant that there was nothing to show who was the buyer and who was the seller. But evidence had been given that Newell was a baker and Radford a flour merchant, and the Court held that this evidence was admissible and removed the uncertainty.

In this case Willes, J., threw some doubt on *Vandenbergh v. Spooner* (b); he considered the memorandum in that case amounted in effect to such a memorandum as this: "A. agrees to buy B.'s horse for 10l." The words were, "A. agrees to buy the horse purchased by B. for 10l." And the two seem to be the same, for the words "purchased by" may be read merely as showing how the horse came to be B.'s. If the wording in *Vandenbergh v. Spooner* (b) had been "A. agrees to buy a horse for 10l. B.," there would have been a fuller memorandum than in *Newell v. Radford* (a), and it would have been held sufficient by the Common Pleas. It seems difficult to see how the words "A. agrees to buy the horse purchased by B. for 10l." are less sufficient.

In *Sharman v. Brandt* (c), in 1871, the plaintiff was a broker, and was authorized by the defendants to purchase hemp for them. The plaintiff carried on business alone, under the style of Simpson & Co. The contract note was as follows: "Bought for Messrs. Brandt and Horny, of our principals, 200 tons, &c. W. W. Simpson & Co." The plaintiff had no principals, but was himself the seller, and on the defendants refusing to take the hemp, brought this action as principal. He was nonsuited, and the Queen's Bench and Exchequer Chamber affirmed the nonsuit, Kelly, C. B., saying it was "not a note of any contract at all between the plaintiff, as seller, and the defendants, as purchasers."

(a) *Newell v. Radford*, 37 L. J. C. P. 1; L. R. 3 C. P. 52.

(b) *Vandenbergh v. Spooner*, 35 L. J. Ex. 201; L. R. 1 Ex. 317.

(c) *Sharman v. Brandt*, 40 L. J. Q. B. 312; L. R. 6 Q. B. 720.

There is no case in which a memorandum that did not disclose who the parties were, has been held sufficient; so that the authorities, though not numerous, are uniform. But it is not necessary that the name of the party with whom the contract is made should be inserted, if there be on the face of the memorandum a sufficient description to show who he is.

When the party is not designated at all, it is a case of a writing on the face of it defective, as containing only part of a contract; so that it is apparent that the agreement between the parties must have been partly not reduced to writing at all. When that is the case, the common law allows the contract to be proved by the writing and by parol; so that the writing shows the terms of the contract, and the parol shows with whom the contract was made. The statute, however, is not satisfied, for though the bargain is shown, it is not in writing. But when the writing describes a party with whom the contract is made, the bargain, so far as respects that, is in writing; and the parol evidence is admitted, not as proving with whom the bargain was made, but as enabling the Court to understand the description in writing, which shows with whom it was made. This is no infringement of the Sale of Goods Act; indeed, if it were, there never could be a good memorandum in writing, for in the simplest case there must be some parol evidence to apply the document (*a*).

In many cases the contract is with a firm using the partnership style, and there is no doubt that in such cases it may be shown by parol who the parties constituting that firm are, and that the contract is made with them.

It is common also for an agent who is making contracts on behalf of a principal to enter into written agreements that on the face of them purport to be made with the agent himself, and make no mention of his having any principal; when this is the case, there might, if it were a new question, be some difficulty in seeing how this contract is to be made the

(*a*) *Sale v. Lambert*, L. R. 18 Eq. 1; *Potter v. Duffield*, L. R. 18 Eq. 4; see also *Curr v. Lynch*, 69 L. J. Ch. 345; [1900] 1 Ch. 643; and *Coombes v. Wilkes*, 61 L. J. Ch. 42; [1891] 3 Ch. 77.

contract of the principal, without directly contradicting the instrument ; for, on the face of it, it has a plain intelligible meaning. However, the decisions have settled, that, without contradicting the writing or preventing its effect as a memorandum under the statute, evidence may be produced to show that the contract was made with the principal, either for the purpose of enabling him to sue or be sued on the contract in his own name ; and they have also settled, that evidence may *not* be produced to show that the contract was *not* made with the agent, for the purpose of preventing his suing or being sued in his own name.

All the authorities bearing on this subject will be found collected in *Higgins v. Senior (a)*, decided in 1841. In that case, in the Exchequer, after taking time to consider, the judgment of the Court was delivered by Parke, B., who said, “ There is no doubt that where such an agreement is made, “ it is competent to show that one or both of the contracting “ parties were agents for other persons and acted as such “ agents in making the contract, so as to give the benefit of “ the contract on the one hand to, and charge with liability “ on the other, the unnamed principal, and this, whether the “ agreement be or be not required to be in writing by the “ Statute of Frauds, and this evidence in no way contradicts “ the written agreement. It does not deny that it is binding “ on those whom, on the face of it, it purports to bind, but “ shows that it also binds another, by reason that the act of “ the agent in signing the agreement in pursuance of his “ authority, is, in law, the act of the principal. But, on the “ other hand, to allow evidence to be given that the party “ who appears on the face of the instrument to be personally “ a contracting party, is not such, would be to allow parol “ evidence to contradict the written agreement, which cannot “ be done.” *Higgins v. Senior (a)* was a case in which the agent, who had contracted in his own name, sought to discharge himself and was not permitted to do so. Almost

(a) *Higgins v. Senior*, 11 L. J. Ex. 199 ; 8 M. & W. 834. See also *Franklyn v. Lamond*, in 1847, 16 L. J. C. P. 221 ; 4 C. B. 637 ; *Kelner v. Baxter*, in 1866, 36 L. J. C. P. 94 ; L. R. 3 C. P. 174 ; *Paice v. Walker*, in 1870,

at the same time, the Queen's Bench, in *Trueman v. Loder* (a), allowed parol evidence to charge the principal with a contract made in the name of his agent. That was a sale of goods; the bought and sold notes which were made use of to make out the contract were headed, "Bought for Messrs. Trueman and Co." (the plaintiffs) and "Sold for Mr. G. Higginbotham." The Court thought it proved that Higginbotham was acting as agent for Loder and Co., the defendants, and that the broker's notes were a sufficient memorandum of a bargain between them and Trueman. "Among the ingenious arguments pressed by the defendant's counsel," said Lord Denman, in delivering judgment, "there was one which it may be fit to notice: the supposition that parol evidence was introduced to vary the contract, showing it not to have been made by Higginbotham, whose name is inserted in it, but by the defendant, who gave him the authority. Parol evidence is always necessary to show that the party sued is the party making the contract and bound by it; whether he does so in his own name or in that of another or in a feigned name, and whether the contract be signed by his own hand or that of an agent, are inquiries not different in their nature from the question, who is the person who has just ordered goods in a shop. If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own."

It may be taken as a general rule, that a writing is not a sufficient memorandum of the bargain, unless it describes (1) the party with whom the bargain is made, though the description need not be by his own name; (2) the goods

39 L. J. Ex. 109; L. R. 5 Ex. 173; *Die Elbinger Co. v. Claye*, in 1873, 42 L. J. Q. B. 151; L. R. 8 Q. B. 313; *Hutton v. Bulloch*, in 1874, L. R. 9 Q. B. 572; *Southwell v. Bowditch*, in 1876, 45 L. J. C. P. 374; L. R. 1 C. P. D. 374; *Gudd v. Houghton*, in 1876, 46 L. J. Ex. 71; L. R. 1 Ex. D. 357; *Hutcheson v. Eaton*, in 1884, L. R. 13 Q. B. D. 861; *Calder v. Dobell*, in 1871, 40 L. J. C. P. 89—224; L. R. 6 C. P. 486; *Curtis v. Williamson*, in 1874, 44 L. J. Q. B. 27; L. R. 10 Q. B. 57. As to the position of an auctioneer, see *Consolidated Co. v. Curtis*, 61 L. J. Q. B. 325; [1892] 1 Q. B. 499.

(a) *Trueman v. Loder*, 11 A. & E. 589.

sold; (3) the price, if any, agreed on; and (4) directly or by implication the nature of the promise of the party to be charged (a).

As has been already observed (b), a memorandum of an agreement within the 4th section of the Statute of Frauds must contain the subject-matter of the agreement and the consideration as well as the promise; but the word in the 17th section was "bargain," not "agreement," and in some of the cases a distinction was drawn between the requirements of the respective sections with regard to the statement of the consideration.

In *Egerton v. Matthews* (c), in 1805, the writing was in the following terms:—"We agree to give Mr. Egerton 19*l.* per lb. for thirty bales Smyrna cotton, customary allowance "cash 3*l.* per cent. as soon as our certificate is complete." It was signed by the defendants. The plaintiff was nonsuited by Lord Ellenborough, on the ground that this was not a sufficient memorandum within the statute. The nonsuit was set aside, and Lord Ellenborough is said to have declared that he had directed the nonsuit without attending to the difference between the wording of the 4th section and of the 17th section, and that the writing was a "memorandum of the "bargain or at least so much of it as was sufficient to bind "the parties to be charged therewith." There is some difficulty in understanding what was the objection to the memorandum as a memorandum of an agreement, and consequently it is difficult to say what the distinction was which Lord Ellenborough made between bargain and agreement, but it appears that he made some distinction.

In *Laythorp v. Bryant* (d), in 1836, which was a case on the 4th section, Tindal, C. J., said, "*Wain v. Warlters* (e) was "decided on the express ground that an agreement under "the 4th section imports more than a bargain under the "17th."

(a) See Chalmers' Sale of Goods Act, 1893, 6th ed., p. 160.

(b) *Ante*, p. 54.

(c) *Egerton v. Matthews*, 6 East, 307.

(d) *Laythorp v. Bryant*, 2 N. C. 735.

(e) *Wain v. Warlters*, 5 East, 10, *ante*, p. 54.

In *Marshall v. Lynn* (a), in 1840, Alderson, B., said, "By the 4th section of the Statute of Frauds it is provided, that the contracts therein mentioned shall be in writing, otherwise no action shall be maintained upon them. The 17th section requires that some note or memorandum in writing of the bargain before made shall be signed by the party to be charged by such contract, or his agent lawfully authorized. There is, undoubtedly, a distinction between the two enactments, for by the 4th section the whole contract must be in writing, including the consideration which induced the party to make the stipulation by which he is to be bound; but by the 17th section it is sufficient if all the terms by which the defendant is to be bound are stated in writing, so as to bind him."

These two last authorities are certainly no more than dicta irrelevant to the cases in which they were spoken; but though they are not supported by any decisions, they are not contradicted by any cases either. It may seem strange that the point has not been decided, but the truth is, it is not of such practical importance as it seems. However, in the Sale of Goods Act the word "contract" is used instead of "bargain," thus apparently doing away with the distinction taken in the cases above referred to.

When a writing containing the terms by which one party is to be bound in a contract of sale, and signed by him, is within the knowledge of the other, so that he can make use of it to bind the contract, it is in very many cases a reduction of the terms of the agreement to writing, such that no objection can be made to it as not containing the whole of the contract, because by the rules of law it is conclusive as to what the bargain is. The terms that are not in it *cannot* be part of the contract.

And even when the circumstances under which the writing was made are such as to make it not more than evidence of the agreement, it is a difficult thing for a party to prove that a written admission signed by himself does not contain the

(a) *Marshall v. Lynn*, 9 L. J. Ex. 127; 6 M. & W. 109.

whole truth. The jury would properly be very unwilling to find that the writing did not contain the whole agreement unless there was some good reason given to explain the inaccuracy.

The question, therefore, can seldom arise except where there is a letter written for some collateral purpose, and alluding incidentally to the bargain. It is most natural in such cases that the letter-writer should only recite so much of the contract as is material to the main subject of his letter, so that he has no great difficulty in establishing the fact that part of the terms are omitted.

There are several cases of this sort, but none in which the writing was a complete memorandum of those terms of the bargain to which the party signing it was bound, but omitted material parts of the engagement of the other party.

In *Cooper v. Smith* (a), in 1812, there had been a parol sale of flour for a price exceeding 10*l*. The plaintiff, who was the seller, more than a week after the contract sent to the defendant an invoice specifying the goods and their price, accompanied by this note:—"Sir, the above was yesterday forwarded by Smith and Son's boat, which I have no doubt will be with you very soon." The defendant wrote next day, apparently in answer, this note:—"Mr. Cooper, Sir, Your not coming or sending the flour I agreed with you for according to time, I am now provided for, therefore it will not suit me to receive yours, as the price is lower. I have been offered flour a great deal lower this day. I expected yours in the course of a week from the time you were at my house. If I buy of any man I expect it according to time, or the bargain is void." The plaintiff's witnesses proved, to the satisfaction of the jury, that there was no term in the contract about the flour being sent within a week, and that it was sent in a reasonable time. The King's Bench held that this letter was not a sufficient memorandum. Lord Ellenborough said, "The plaintiff cannot avail himself of that letter as evidence of the contract for one purpose, to

(a) *Cooper v. Smith*, 15 East, 103.

“bind the defendant with the statute, and renounce it for another purpose; but he must take it altogether; and then it falsifies the contract proved by parol testimony for the plaintiff.”

In *Elmore v. Kingscote* (a), in 1826, there was a sale by word of mouth on the 13th June of a horse, warranted five years old, for 200 guineas. To take the case out of the Statute of Frauds, the plaintiff relied on a letter which was written and signed by the defendant, and sent to the plaintiff on the 18th June in the following terms:—“Mr. Kingscote begs to inform Mr. Elmore, that if the horse can be proved to be five years old on the 13th of this month in a perfectly satisfactory manner, of course he shall be most happy to take him, and if not most clearly proved, Mr. K. will most decidedly have nothing to do with him.” The plaintiff was nonsuited by Abbott, C. J., and the King’s Bench confirmed the nonsuit, because the price was a material part of the bargain. The plaintiff’s counsel contended, that there being no mention of the price in the letter, the law would imply that a reasonable price was to be paid. Probably this would have sufficed if the real contract had not been for a fixed sum; and if the note had been written whilst the bargain was being made, the defendant would perhaps have been bound to a bargain for a reasonable price; but the note was evidently written after the bargain was complete, and in consequence of a dispute about the warranty, so that the defendant had no difficulty either in law or fact in establishing that there was a specific price which he had made no mention of in his letter, because it was immaterial to the question of warranty concerning which it was written. The Court, however, are not reported to have given their reasons for overruling this last objection.

In *Acebal v. Levy* (b), in 1834, there was a verbal contract for the sale of a shipload of nuts, to be put on board by the plaintiffs at Gijon, in Spain, and to be paid for by the

(a) *Elmore v. Kingscote*, 5 B. & C. 583.

(b) *Acebal v. Levy*, 10 Bing. 376.

defendants at the then shipping price at Gijon. There was a correspondence between the parties about the transfer of the charter of a vessel, in the course of which it appeared that the ship was to be loaded with nuts for the defendant, but there was no mention whatever of the price. The plaintiff's counsel contended that the law would imply a contract to pay a reasonable price. The Common Pleas decided that this correspondence was no memorandum of the contract actually made, for even if the law would imply from the correspondence that the nuts were to be paid for at a reasonable price, the parol evidence showed that they were to be sold at the shipping price at Gijon, which was by no means necessarily a reasonable price. In delivering judgment, Tindal, C. J., said, "In order to recover on the count for goods bargained and sold a sufficient note or memorandum of the contract of sale at a reasonable price is just as necessary as on the special count, but, for the reasons already given, the note produced cannot prove a sale at a reasonable price where it is silent altogether as to price, and the parol evidence shows a different contract to have been made."

In *Hoadley v. McLean* (a), in 1834, the defendant wrote to the plaintiff on the 15th May, 1832: "Sir Arch. McLean orders Mr. Hoadley to build a new, fashionable and handsome landaulet (here followed a minute description of it), the whole to be ready by the 1st March, 1833." No price was ever agreed upon between the parties, and upon the landaulet being finished they quarrelled about what was a reasonable price; the jury, who were the proper judges of the fact, found that 480*l.*, which Hoadley demanded, was very reasonable. The Common Pleas considered the order a sufficient memorandum: Tindal, C. J., said, "What is implied by law is as strong to bind the parties as if it were under their hand. This is a contract in which the parties are silent as to price, and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth" (b).

(a) *Hoadley v. McLean*, 10 Bing. 482.

(b) See also *Ashcroft v. Murrin*, 4 M. & G. 450; *Valpy v. Gibson*, 16 L. J. C. P. 241; 4 C. B. 837; and Sale of Goods Act, s. 8.

It is to be observed, that in *Hoadley v. McLean* (a) there was no attempt to show that a specific price was agreed upon; but it is very doubtful whether the law would have permitted any parol evidence to show that there was such a term in the bargain, for the order sent by Sir Archibald seems to have been the written bargain itself. It is clear that in *Cooper v. Smith* (b) and *Elmore v. Kingscote* (c) the writings were not the agreements, but only admissions of some of the terms of agreements previously made; and probably in *Acebal v. Levy* (d) the mention of the terms of the bargain was but incidental, though the report scarcely furnishes means of judging of that. In *Goodman v. Griffiths* (e), in 1857, the memorandum was held insufficient because the price which had been agreed upon was not mentioned.

It is very clear that in all those cases in which the memorandum was held defective the omissions very materially qualified the defendant's liability, and therefore these decisions are not contradictory of the dictum of Alderson, B., in *Marshall v. Lynn* (f), but there is nothing in the language of the different Judges who decided them to show that any distinction was present to their minds between a memorandum sufficient to charge the one party and a memorandum sufficient to charge the other. And it does seem an unnecessary multiplying of subtleties to hold that a writing in the very same terms should be a memorandum of the bargain when used by the bargainee, and cease to be one when used by the bargainor, and that inconvenience is avoided by adopting the definition of Holroyd, J., in *Kenworthy v. Schofield* (g), viz., "It appears to me that you cannot call that a memorandum of a bargain which does not contain the terms of it."

It sometimes happens that after a dispute has arisen a

(a) *Hoadley v. McLean*, 10 Bing. 482.

(b) *Cooper v. Smith*, 15 East, 103.

(c) *Elmore v. Kingscote*, 5 B. & C. 583.

(d) *Acebal v. Levy*, 10 Bing. 376.

(e) *Goodman v. Griffiths*, 26 L. J. Ex. 145; 1 H. & N. 574. See also *Lockett v. Nicklin*, 19 L. J. Ex. 403; 2 Ex. 93, in 1848; *Peirce v. Corf*, 43 L. J. Q. B. 52; L. B. 9 Q. B. 210.

(f) *Marshall v. Lynn*, 9 L. J. Ex. 127; 6 M. & W. 109.

(g) *Kenworthy v. Schofield*, 2 B. & C. 948.

party in a letter signed by him recapitulates the whole terms of the bargain, for the purpose of saying that the bargain is at an end for some reason which is evidently insufficient in law. For some time it was a doubtful point whether such an admission of the terms of the contract signed for the express purpose of repudiation could be considered a memorandum to make the contract good, but it is now settled law that a letter written for such a purpose may be used as a memorandum, if it contains the terms of the contract.

In *Bailey v. Sweeting* (a), in 1861, the defendant verbally ordered of the plaintiffs some chimney glasses to be paid for in cash, and some other goods on credit. When the chimney glasses arrived they were in a damaged state, and the defendant refused to accept them. He wrote to the plaintiffs, "I beg to say that the only parcel of goods selected for ready money was the chimney glasses, amounting to 38*l.* 10*s.* 6*d.*, which goods I have never received, and have long since declined to have." The defendant paid the price of the other goods into Court; and the jury having found that the contract for the chimney glasses was a separate one, the Court, consisting of Erle, C. J., Williams, Willes and Keating, JJ., held that the letter, although written for the purpose of repudiating the contract, was a sufficient memorandum, and that the plaintiffs were entitled to recover.

This decision, although questioned in *Smith v. Hudson* (b), in 1865, was followed in *Wilkinson v. Evans* (c), in 1866, where, the seller having sent some cheeses and candles to the buyer and an invoice "in the usual form," the buyer sent them back with a note signed by himself on the back of the invoice, "The cheese came to-day, but I did not take them in, for they were very badly crushed; so the candles and cheese is returned." The seller was nonsuited on the ground that there was no sufficient memorandum. On the motion for a new trial it

(a) *Bailey v. Sweeting*, 30 L. J. C. P. 150; 9 C. B. N. S. 843.

(b) *Smith v. Hudson* (1865), 34 L. J. Q. B. 145, at p. 149.

(c) *Wilkinson v. Evans*, 35 L. J. C. P. 224 41 L. J. Ex. 1 and 173; L. R. 1 C. P. 407.

was argued for the buyer that the invoice was no evidence of a sale, for the goods might possibly have been sent on approval. But the Court ordered a new trial on the ground that the indorsement on the invoice was a statement of an objection, not to the terms of the contract as there set out, but to the manner in which it had been performed, and was therefore some evidence of a contract (a).

In *Godwin v. Francis* (b), in 1870, it was held that a telegram sent by the defendant was a sufficient memorandum.

But these cases must be distinguished from cases in which the repudiation did not contain the terms of the contract, but still left them doubtful.

In *Cooper v. Smith* (c), in 1812, which has been already cited (d), the decision of the Court seems to have turned on the fact of the note containing terms materially different from those of the bargain declared on and proved.

In *Richards v. Porter* (e), in 1827, the defendant wrote to the plaintiffs: "The hops, five pockets, which I bought of Mr. Richards on the 23rd of last month are not yet arrived, nor have I ever heard of them. I received the invoice. The last was much longer than they ought to have been on the road; however, if they do not arrive in a few days I must get some elsewhere." The plaintiffs were nonsuited, and the King's Bench held the nonsuit right. Lord Tenterden said, "I think this letter is not a sufficient note or memorandum in writing of the contract to satisfy the Statute of Frauds. Even connecting it with the invoice, it is imperfect. If we were to decide that this is a sufficient note in writing, we should in effect hold, that if a man were to write and say, 'I have received your invoice, but I insist upon it the hops have not been sent in time,' that would be a note or memorandum sufficient to satisfy the

(a) See also *Buxton v. Rust*, 7 Ex. 1 and 279; *Leather Cloth Co. v. Hieronimus*, 44 L. J. Q. B. 51; L. R. 10 Q. B. 140.

(b) *Godwin v. Francis*, 39 L. J. C. P. 121; L. R. 5 C. P. 295.

(c) *Cooper v. Smith*, 15 East, 103.

(d) *Ante*, p. 63.

(e) *Richards v. Porter*, 6 B. & C. 437.

“statute. I think the case of *Cooper v. Smith* (a) in substance “is not distinguishable from this” (b).

In *Smith v. Surman* (c), in 1829, the plaintiff’s attorney wrote to the defendant, “Sir, I am directed by Mr. Smith, of “Norton Hall, to request you will forthwith pay for the ash “timber which you purchased of him. The trees are “numbered from 1 to 19, and contain a fair admeasure- “ment 229 feet 7 inches. The value at 1s. 6d. per foot “amounts to 17l. 3s. 6d. I understand your objection to “complete your contract is on the ground that the timber is “faulty and unsound, but there is sufficient evidence to show “that the same timber is very kind and superior, and a “superior marketable article. I understand you object to “the manner in which the trees were cross cut, but there is “also evidence to prove they were so cut by your direction. “Unless the debt is immediately discharged, I have instruc- “tions to commence an action against you.” The defendant wrote in answer, “Sir, I have this moment received a letter “from you, respecting Mr. Smith’s timber, which I bought “of him at 1s. 6d. per foot, to be sound and good, which I “have some doubt whether it is or not; but he promised to “make it so, and now denies it. When I saw him, he told “me I should not have any without all, so we agreed upon “those terms, and I expected him to sell it to somebody else.” This was held not a sufficient note or memorandum of the bargain. Bayley, J., seems to have formed his judgment partly because the buyer did not recognise the bargain as a binding bargain; the other two Judges, Littledale and Park, only say that the letters were inconsistent.

A mere proposal with proof of parol acceptance is sufficient.

In *Reuss v. Picksley* (d), in 1866, where a proposal in writing signed by the defendant had been assented to by the plaintiff by parol, and contained the names of the parties and all the other terms of the bargain, the Court held that it was a

(a) *Ubi supra*.

(b) See also *Archer v. Baynes*, 20 L. J. Ex. 54; 5 Ex. 625.

(c) *Smith v. Surman*, 9 B. & C. 561.

(d) *Reuss v. Picksley*, 35 L. J. Ex. 218; L. R. 1 Ex. 342.

sufficient memorandum, following *Warner v. Willington* (a) and *Smith v. Neale* (b).

What is a Signature.

The note or memorandum must be signed by the party to be charged, or his agent in that behalf. The words used in the 17th section of the Statute of Frauds were "the parties "to be charged by the contract, or their agent thereunto lawfully authorized," and in *Allen v. Bennet* (c), in 1810, the objection was made that the words of the section required the note or memorandum to be signed on behalf of both parties to the contract; but even then the Common Pleas treated the question as one conclusively settled by inveterate practice. "All these cases," said Sir J. Mansfield, "*Egerton v. Matthews* (d), *Saunderson v. Jackson* (e), and *Champion v. Plummer* (f), suppose a signature by the seller to be sufficient, and everyone knows it is the daily practice of the Courts of Chancery to establish contracts signed by one person only, and yet a Court of equity can no more dispense with the Statute of Frauds than a Court of law."

A curious question was made in the following case as to the effect as to third persons of a contract of sale, good as against the one party who had signed a memorandum, but not binding on the other party who had not either repudiated or confirmed the contract.

The case was *Coates v. Chaplin* (g), in 1842. The plaintiffs, Coates and Co., verbally agreed to sell goods above the value of 10*l.* to Morrison and Co.; they sent them by the defendants, who were carriers. The goods were lost on the way, and the question was, who should bring the action against the

(a) *Warner v. Willington*, in 1856, 25 L. J. Ch. 662.

(b) *Smith v. Neale*, in 1857, 26 L. J. C. P. 143; 2 C. B. N. S. 67; see also *Liverpool Bank v. Eccles*, in 1859, 28 L. J. Ex. 122; 4 H. & N. 139.

(c) *Allen v. Bennet*, 3 Taunt. 169.

(d) *Egerton v. Matthews*, 6 East, 307.

(e) *Saunderson v. Jackson*, 2 B. & P. 38.

(f) *Champion v. Plummer*, 1 N. B. 252.

(g) *Coates v. Chaplin*, 3 Q. B. 483; 6 Jur. 1123.

carriers, Coates or Morrison. In general, the proper party to sue a carrier for negligence is the owner of the damaged goods. In this case, at the time of the loss the contract of sale was good against Coates and Co., who had sent Morrison and Co. a letter containing an invoice, but good or not against Morrison and Co. at their election; but at the time of the loss they had exercised no election. The Queen's Bench decided the case on the narrow ground that there was no distinct evidence that Coates and Co. had any authority from Morrison and Co. to employ a carrier at all; but probably they would, if necessary, have held that the property was not changed (as against third parties) till the sale was binding on both seller and buyer (a).

The signature to the memorandum may be the signature either of the name of the party himself, or of the name of his agent (b). There is no more objection to showing that the signature of the agent's name is meant as the signature of the principal, than to showing that a contract purporting to be made with the agent is made with the principal, and that may always be done.

The signature of the name may be in writing or in print, and it is immaterial in what part of the document it appears, provided there are circumstances to show that it was appropriated by the party to the authentication of the contract.

It is a signing and not a subscribing which the section requires (c); and it matters not whether the signature is at the beginning, in the middle, or at the end of the document (d).

Perhaps the case of *Saunderson v. Jackson* (e), in 1800, may be considered as the extreme limit to which this doctrine has been carried. In that case there was a bill of parcels

(a) See also *Coombs v. Bristol and Exeter Ry. Co.*, in 1858, 27 L. J. Ex. 401; 3 H. & N. 510.

(b) *White v. Proctor*, 4 Taunt. 209.

(c) Per Lord Westbury in *Caton v. Caton*, in 1867, 36 L. J. Ch. 891; L. R. 2 H. L. 142.

(d) Per Blackburn, J., in *Durrell v. Evans*, in 1862, 31 L. J. Ex. 337; 1 H. & C. 191.

(e) *Saunderson v. Jackson*, 3 B. & P. 238.

with a printed heading, "Bought of Jackson and Hankin," the names of the defendants: the blanks in it were filled up with the name of the plaintiff and the quantity and price of the goods bought; it was then delivered to the plaintiff. Lord Eldon, C. J., said, "The single question is, whether, if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name as well as by his written name. . . . It has been decided that if a man draw up an agreement in his own handwriting, beginning, I, A. B., agree, &c., and leave a place for a signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute, and yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed. This last case is stronger than the one now before us, and affords an answer to the argument that this bill of parcels was not delivered as a note or memorandum of the contract."

In *Schneider v. Norris* (a), in 1814, there was a similar invoice, with "Bought of Norris and Co." printed on it; the body of it was filled up in the handwriting of Norris. The King's Bench held this a document signed by Norris. Lord Ellenborough said, "I cannot but think that a construction which went the length of holding that in no case a printing, or any other form of signature, could be substituted in lieu of writing, would be going a great way, considering how many instances may occur in which the parties contracting are unable to sign. If, indeed, this case had rested merely on the printed name, unrecognised by and not brought home to the party as having been printed by him, or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt whether it would not be intrenching on the statute to have admitted it; but here there is a signing by

(a) *Schneider v. Norris*, 2 M. & S. 286. See also *Evans v. Hoare*, 61 L. J. Q. B. 470; [1892] 1 Q. B. 593.

“ the party to be charged by words, recognising the printed
 “ name as much as if he had subscribed his mark to it, which
 “ is strictly the meaning of signing, and by that the party
 “ has incorporated and avowed the thing printed to be his,
 “ and it is the same in substance as if he had written Norris
 “ and Co. with his own hand. He has by his handwriting in
 “ effect said, I acknowledge what I have written to be for the
 “ purpose of exhibiting my recognition of the within contract.
 “ It appears to me, therefore, that the printed name thus
 “ recognised is a signature sufficient to take this case out of
 “ the statute.”

In *Johnson v. Dodgson* (a), in 1837, the defendant, who was the buyer, at the time of making the contract wrote in his pocket-book an entry, beginning, “Sold John Dodgson,” and containing the terms of the bargain. He requested the plaintiff’s traveller to sign this entry, which he did; Dodgson retained the book in his own possession. The Exchequer held this a memorandum, signed by Dodgson. Lord Abinger said, “The cases have decided that although the signature be
 “ in the beginning or middle of the instrument, it is as
 “ binding as if at the foot of it; the question being always
 “ open to the jury whether the party not having signed it
 “ regularly at the foot meant to be bound by it as it stood,
 “ or whether it was left so unsigned because he refused to
 “ complete it. But when it is ascertained that he meant to
 “ be bound by it as a complete contract, the statute is
 “ satisfied, there being a note in writing showing the terms
 “ of the contract, and recognised by him.” Parke, B., said,
 “ The point is in effect decided by the cases of *Saunderson v.*
 “ *Jackson* (b) and *Schneider v. Norris* (c). There the bill of
 “ parcels was held to be a sufficient memorandum in writing,
 “ it being proved that they were recognised by being handed
 “ over to the other party. Here the entry was written by
 “ the defendant himself, and required by him to be signed
 “ by the plaintiff’s agent: that is amply sufficient to show

(a) *Johnson v. Dodgson*, 6 L. J. Ex. 185; 2 M. & W. 653.

(b) *Saunderson v. Jackson*, 3 B. & P. 238.

(c) *Schneider v. Norris*, 2 M. & S. 286.

“that he meant it to be a memorandum of the contract
“between the parties.”

These three decisions, which, considering who decided them, comprise a very great weight of authority, are perfectly consistent, but it may be observed that the principles stated in the judgment of the Exchequer are far stricter than those of Lord Eldon. He seems to have thought that the name of the party appearing in a document recognised by him must be a signature, whatever the intention was. The Exchequer only say it is a signature when recognised as a binding memorandum. Lord Ellenborough seems to have decided *Schneider v. Norris* (a) on the principle that the circumstances there showed that Norris had “appropriated “the printed name to the purpose of exhibiting his recognition of that particular contract,” a phrase which seems to mark very well the difference between signing a name and merely writing it (b). It is to be observed, that the appropriation of the name in each of the cases was simultaneous with the completion of the instrument. It may, perhaps, be doubtful whether, if a writing containing the name of a party is complete under circumstances which show that it is not signed, it could be converted into a signed document by any subsequent parol expressions of intention whatsoever. And this is a doubt that may be of practical importance, for when one party only has signed a memorandum, which to be a memorandum of the bargain must contain the name of the other party, the contract is good or not at the election of the non-signing party. But it has never been decided that the party having by word of mouth clearly and unequivocally expressed his election to hold the signer to his bargain, was more bound than before. There seems no legal reason why he may not keep the signer of the contract bound till the last moment, and then adopt or repudiate the contract as he may think most convenient for himself, or if malicious, most inconvenient for the party who has signed. If, however, a

(a) *Schneider v. Norris*, 2 M. & S. 286.

(b) See *Murphy v. Boese*, 44 L. J. Ex. 40; L. R. 10 Ex. 126, *post*, p. 81.

recognition of a contract containing his name is a signature, he might soon be driven either to recognise the contract, and so be bound, or to repudiate it, and so set the other side free. But though this would be just and convenient, it would be a strain upon the cases, and a very great strain upon the words of the section.

In the last case on this subject, *Hucklesby v. Hook* (a), in 1900, the buyer had written an offer to purchase upon a sheet of letter paper belonging to the seller and bearing at the top the seller's printed name and address, and it was held that, as the seller had not written any part of the document, there had been no appropriation by him of the printed name as a signature; and *Schneider v. Norris* (b) was distinguished on this ground.

In the case of *Stewart v. Eddowes* and *Hudson v. Stewart* (c), in 1874, the signature was upon the memorandum, but not for the purpose of recognising the contract, that recognition being a subsequent act, and it was held sufficient. There Hudson employed Eddowes to sell a ship to Stewart. An unsigned memorandum of the proposed terms was submitted to Stewart, who made some alterations in it and signed it. The alterations were subsequently struck out with his consent, and the memorandum was sent to Hudson, who made some other alterations and returned it to Eddowes, who signed it on behalf of Hudson and took it to Stewart, who acquiesced in the alterations and approved of the agreement. It was objected for Stewart, in the action to recover the balance of the purchase-money, that parol evidence to show that he had acquiesced in the contract as altered was inadmissible. But the Court held that it was admissible, Coleridge, C. J., saying, "There was no variation of the contract, for there was no contract between the parties until the proposal was submitted to Stewart, and Stewart on meeting Eddowes agreed that his handwriting should operate as a signature to what then became a complete agreement between the parties."

(a) *Hucklesby v. Hook*, 82 L. T. 17.

(b) *Ubi supra*.

(c) *Stewart v. Eddowes*, *Hudson v. Stewart*, 43 L. J. C. P. 204; L. R. 9 C. P. 311.

Any mark which is intended to be a signature is sufficient (a); but there must be something which is intended to be a signature; a mere description will not satisfy the statute (b).

And most probably a stamp intended as a signature would be sufficient, for, as Willes, J., said in *Bennett v. Brumfitt* (c), "The using a stamp is only a compendious way of writing 'the party's name.'"

In *Geary v. Physic* (d), in 1826, Abbott, C. J., said, "There 'is no authority for saying that where the law requires a 'contract to be in writing, that writing must be in ink.'" In that case a promissory note had been indorsed in pencil.

Who is an agent authorized to sign.

The section is satisfied if the memorandum of the contract is signed by the party to be charged, or his agent in that behalf. There is nothing in the wording of the section to alter the general law of agency. The agent does not require an authority in writing to enable him to sign the note, and in *Maclean v. Dunn* (e), in 1827, it was decided that in this, as well as in other cases of agency, a subsequent ratification was equivalent to a previous authority. To establish a subsequent ratification, however, the principal must be in existence when the contract is made, and the agent must have proposed at the time to be acting on behalf of a principal (f). The fact of agency may be established and any person may be proved to be an agent for this purpose, in the same manner and subject to the same rules as in cases of agency for any other purpose. It has indeed been decided that the one party cannot be an agent for the other, but this is very doubtful law. It is quite right and proper that such an unusual thing

(a) *Baker v. Dening*, 8 A. & E. 94; *Helshaw v. Langley*, 11 L. J. Ch. 17.

(b) *Selby v. Selby*, 3 Mer. 2.

(c) *Bennett v. Brumfitt*, in 1867, 37 L. J. C. P. 35; L. R. 3 C. P. 31.

(d) *Geary v. Physic*, 5 B. & C. 237.

(e) *Maclean v. Dunn*, 4 Bing. 722.

(f) *Keighley v. Durant*, 70 L. J. K. B. 622; [1901] A. C. 240.

as intrusting the other side with authority should be clearly proved; but if it be clearly proved, there is nothing either in the section or in reason to make it void.

In *Wright v. Dannah* (a), in 1809, the plaintiff had in the presence of the defendant written down the defendant's name, the goods, and the price. The defendant looked it over, and said one of the figures was wrong. It seems clear that this was no memorandum, for the plaintiff's name did not appear, and the proof of agency was of the most meagre description. Lord Ellenborough nonsuited the plaintiff, and is reported to have said, "that the agent must be some third person, and "could not be the other contracting party."

In *Farebrother v. Simmons* (b), in 1822, the King's Bench decided that an auctioneer who had taken down the highest bidder's name, could not use this as a signature when suing in his own name, and Abbott, C. J., on the authority of *Wright v. Dannah* (a), said, "that the agent contemplated by the "legislature who is to bind a party by his signature must be "some third party, and not the other contracting party on "the record." In *Wright v. Dannah* (a), Lord Ellenborough seems to have been speaking of the difficulty of establishing such an agency in fact; but in *Farebrother v. Simmons* (b) it was supposed to be impossible in law. The case was much questioned in *Bird v. Boulter* (c), but it has not yet been overruled.

In *Sharman v. Brandt* (d), in 1871, the Court decided that one party could not be the agent of the other for the purpose of signing his name, but none of the Judges gave their reasons for so holding, and some of the Judges based their decisions on another ground.

When an agent is authorized to make a contract of sale, he has by implication authority to make it effectually, by signing the note of it; but there is no reason why a special

(a) *Wright v. Dannah*, 2 Camp. 203.

(b) *Farebrother v. Simmons*, 5 B. & Ald. 334.

(c) *Bird v. Boulter*, 4 B. & Ad. 443; see also *Sims v. Lannndray*, 63 L. J. Ch. 535; [1894] 2 Ch. 318; but cf. *Bell v. Balls*, 66 L. J. Ch. 397; [1897] 1 Ch. 663.

(d) *Sharman v. Brandt*, 40 L. J. Q. B. 312; L. R. 6 Q. B. 722.

authority should not be given to sign a particular contract, without giving any authority to make a contract or to vary from the particular one already made. The distinction between the two sorts of agency is material; for if an agent, having authority to make a contract, makes a mistake in reducing it to writing, neither he nor his principal can show that the true contract was different, for that would be contradicting the written agreement; but if the agent had only a special authority to sign a particular contract, it is open to the principal to show that the agent has not pursued his authority.

An auctioneer is an agent having power from the seller to sell, and having therefore incidentally authority from him to sign the contract. It is also established that the highest bidder at the sale, by the act of bidding, himself makes a contract of sale at that price subject to the conditions of sale, and gives the auctioneer authority to sign that contract so made. It was held in *Bird v. Boulter* (a), in 1833, that where the auctioneer's clerk was seen by all parties to be taking down the names of the highest bidders, he must be considered to have their authority to sign the contract.

But it is plain that neither auctioneer nor clerk has any authority from the bidder to make a contract for him. The bidder makes the contract himself, and all he authorizes is, that the contract actually made shall then be signed. If, therefore, the auctioneer signs a contract, omitting or misstating the conditions of sale, he has not pursued his authority, and the bidder is not bound, though the contract on the face of it is complete.

These points were all decided in *Hinde v. Whitehouse* (b), in 1806. Lord Ellenborough said that whatever might have been his opinion, if the matter were new, he thought that the practice of considering an auctioneer as agent for both parties was settled; but though in that case the auctioneer had signed a memorandum on the catalogue, which Lord Ellen-

(a) *Bird v. Boulter*, 4 B. & Ad. 443.

(b) *Hinde v. Whitehouse*, 7 East, 558.

borough said might perhaps be a memorandum of a sale for ready money, he thought that did not bind the buyer, who had bid subject to conditions of sale; he said, "Has the auctioneer made a memorandum of the bargain in this case? It appears to me that he has not; the minute made on the catalogue of sale, which is not annexed to the conditions of sale nor has any internal reference to them by context or the like, is a mere memorandum of the name of a person whom, perhaps, we may intend to be the purchaser, and of the quantity and price of the goods which we may, perhaps, on the foot of such memorandum also intend to have been sold to the person so named in the catalogue. But in treating it as such memorandum throughout, we must intend also (contrary to the fact), that the goods were sold for ready money, and unattended by the circumstances specified in the conditions of sale; and the conditions of sale, though as unsigned, they cannot be evidence of the bargain itself, are yet capable of being given in evidence; and accordingly have been so, as a part of the transaction between the parties, and in order to show that it was on those conditions that the goods were sold. I am of opinion therefore that the mere writing on the catalogue, not being by any reference incorporated with the conditions of sale, is not a memorandum of a bargain under those conditions of sale."

It is, however, to be remembered, that the contract which the auctioneer has authority to sign is that contained in the written conditions of sale exhibited at the auction, and that when such a contract is signed by the auctioneer, the buyer cannot vary it by proof of representations or agreements entered into by word of mouth at the time of the auction (a).

The case of *Bartlett v. Purnell* (b), in 1836, was rather a curious one. There the plaintiff, who was going to sell some

(a) See *Livins v. Shelton*, 2 Cr. & J. 446.

(b) *Bartlett v. Purnell*, 4 Ad. & El. 792; see also *Sims v. Lannndray*, 63 L. J. Ch. 535; [1894] 2 Ch. 318.

goods by auction, owed money to the defendant, who proposed to purchase some of them, and before the auction took place they agreed that the goods purchased should be set off against the debt. The conditions of sale stated that the goods were to be paid for on delivery. It was argued for the plaintiff that evidence of this agreement should not have been admitted, as it went to qualify written evidence; but the Court thought it was properly admitted, for the defendant had not in fact contracted according to the conditions of sale, but according to the agreement.

Although an auctioneer has authority, while the sale is going on, by general custom recognised by the law, to sign as agent for both parties, the auctioneer's clerk has no such authority; but he may be specially authorized (a). *Prima facie* he is the auctioneer's agent only.

In *Mews v. Carr* (b), in 1856, the defendant called on the auctioneer the day after the sale, and asked what lots were unsold. The auctioneer pointed them out on the catalogue, and the defendant agreed to purchase some of them. The auctioneer then wrote the defendant's name opposite them. The Court held that there was no evidence that the auctioneer was the agent of the defendant to sign his name (c).

In *Graham v. Musson* (d), in 1839, and *Graham v. Fretwell* (e), in 1841, where a memorandum, in which the plaintiff's name alone appeared, had been signed by Dyson, the plaintiff's agent, it was argued for the plaintiff that his agent had in fact signed as agent for the defendant, but the Court in both cases thought there was no evidence of it.

Blackburn, J., speaking of these cases in *Durrell v. Evans* (f), said, "The signature was that of Dyson, the agent of the seller, put there at the request of Musson, the buyer, in order to bind the seller; and unless the name of Dyson

(a) *Peirce v. Corf*, 43 L. J. Q. B. 52; L. R. 9 Q. B. 215, in 1874. See also *Gosbell v. Archer*, 2 Ad. & El. 500.

(b) *Mews v. Carr*, 26 L. J. Ex. 29; 1 H. & N. 484.

(c) See also *Graham v. Musson*, in 1839, 5 Bing. N. C. 603.

(d) *Graham v. Musson*, 5 Bing. N. C. 603, *ante*, p. 56.

(e) *Graham v. Fretwell*, 3 M. & G. 368, *ante*, p. 56.

(f) *Durrell v. Evans*, 31 L. J. Ex. 387; 1 H. & C. 174.

“was used as equivalent to Musson, there was no signature by the defendant; but in point of fact, ‘J. Dyson’ was equivalent to ‘for or per pro North and Co., J. Dyson.’” The plaintiffs carried on business as North and Co.

In *Durrell v. Evans* (a), in 1862, the defendant went with the plaintiff to the premises of a hop factor named Noakes, and agreed to purchase some of the plaintiff's hops. Noakes then made a memorandum in his book beginning “Messrs. ‘Evans bought of J. T. and W. Noakes,’ &c., and dated it. At the defendant's request he altered the date, for the purpose of altering the time of payment. He then tore the memorandum from the counterfoil to which it was attached, and gave it to the defendant. The counterfoil was filled up as follows: “Sold to Messrs. Evans,” &c. There was no signature by the defendant himself. Blackburn, J., in delivering judgment, said that “Noakes was not a broker who derived his authority from the nature of his employment to sign for both parties, and therefore the question was whether there was any evidence that he had been authorized by the defendant in this case to sign his name, and as the Court was of opinion that there was *some* evidence of this, a new trial was granted” (b).

In *Murphy v. Boese* (c), in 1875, the plaintiff's traveller called on the defendant, and agreed for the sale of clocks. He then wrote in duplicate, on a printed form headed with the plaintiff's name, the particulars of the sale and the name and address of the defendant. The defendant contended that this was nothing more than an invoice or bill, or was not a memorandum which had been signed by the traveller as his agent, and the Court, consisting of Bramwell, Pigott, and Pollock, BB., were of the same opinion.

(a) *Durrell v. Evans*, 31 L. J. Ex. 387; 1 H. & C. 174.

(b) See also *Simmonds v. Humble*, 13 C. B. N. S. 258, in 1862; 9 L. T. 168.

(c) *Murphy v. Boese*, 44 L. J. Ex. 40; L. R. 10 Ex. 126; see also *John Griffiths Cycle Corporation v. Hunter & Co.*, 68 L. J. Q. B. 959; [1899] 2 Q. B. 414.

Memorandum must be signed by the party to be charged. In *Mingaye v. Corbett*, 14 U. C. C. P. 557 (1864), already cited on the point that a sale by the sheriff, under execution, is within the Statute of Frauds, the memorandum was signed by the purchaser in a book, acknowledging the amount of his bid for the goods, but no memorandum was signed by the auctioneer, and it was held that the purchaser could not recover in his action against the sheriff.

Memorandum apparently in conflict with actual oral agreement. The defendant in *McBride v. Silverthorne*, 11 U. C. Q. B. 545 (1854), sold wheat to be delivered at the buyer's mill, and the buyer signed a receipt in this form: "Received in store from Mr. Joseph McBride . . . fifty-one bushels twenty-one pounds fall wheat at £—s.—d., amounting to £—s.—d., currency." The actual agreement between the parties was not embodied in this memorandum, which was in fact merely a receipt given to show the amount acknowledged to have been delivered. It was held that the actual contract could be proved. It will be observed that the plaintiff was not relying upon the receipt as a memorandum of the contract. The defendant relied on it as showing a contract "to store" the wheat. But the receipt was not inconsistent with a contract to sell, and it was not necessary to inquire what the effect would have been if there had been a conflict.

Parol evidence of term not in memorandum admissible to destroy memorandum. In *Calder v. Hallett*, 5 Terr. 1, where a verbal order was taken for goods, one of the terms being a six months' credit in a certain event, and plaintiff's agent signed a memorandum containing all the terms of the contract except this one, and the defendant subsequently wrote, cancelling the order which he had given, which led to further correspondence, and in none of the letters was any reference made to the term of six months' credit, it was held that evidence could be given of that term as it did not appear in any of the documents submitted to constitute the memorandum in writing. The letter cancelling the contract could not be taken as constituting an acceptance of the goods. It was not a meddling with the goods, it was an act done not in relation to the goods themselves but in relation to the order for the goods.

Presumption as to contents of memorandum withheld by defendant. In *Ockley v. Masson*, 6 O. A. R. 108, a sale was made to the plaintiff by the agent of the defendants. The sale was entered in a book by the agent, but the book was not produced at the trial. The defendants admitted having received the order, but they had written to the defendant disapproving in part of the transaction. Plaintiffs sought to hold them to the whole bargain as made by the agent, and the question arose as to the fact of the agency and the sufficiency of the proof of a memorandum. This was supplied by admissions of the defendants as to a letter having been written by Kerr reporting the sale, the letter not having been produced although called for under notice to produce. The court held that it might presume, if necessary, against the defendants who were withholding the letter, that it contained the terms of the sale and at the prices named in the list produced by the plaintiff of the things ordered by the defendant, the defendants having withheld the letter. In short, as summarized in the judgment of the court, the plaintiffs relied on a sale made by the agent and on his memorandum thereof communicated to the defendants and acknowledged in their letter as having been reported to them. Of course their repudiation of the bargain was a nullity if it had been validly made by their agent.

Letter repudiating obligation may be a memorandum to satisfy statute. Letter of agent to principal may be a memorandum of principal's agreement with another. In the case already referred to, 6 O.A.R. 108, for non-delivery of groceries, it was shown that one Kerr, who made the sale as agent for the defendants, had entered the sale in a book which was not produced; but plaintiff produced a copy of the list of the things ordered, and their prices. Kerr sent the order in a letter to the defendants, who thereupon wrote plaintiffs, saying that Kerr had reported a sale which they (the defendants) could not approve, but would accept for certain articles enumerated. Plaintiffs insisted on the completion of the order in full, and the defendants cancelled it altogether. This was held to be a sufficient memorandum of the contract, notwithstanding the defendants' disapproval, therein expressed, of part of the order.

The letter of Kerr to his principals not having been produced, although called for by the notice to produce, it was held that the court might presume, if necessary, that it stated anything further which might be necessary to the plaintiff's case, and in particular that it might be assumed that Kerr had, in his letter, stated that he had made a sale of the goods to the plaintiffs at prices named in the list. The authority for the large presumption thus stated by the court to be reasonable is said to be found in the cases cited in Broom's Legal Maxims, in illustration of the rule, *omnia praesumuntur contra spoliatores*.

The principle of the leading case on this point, *Bailey v. Sweeting*, 9 C. B. N. S. 843, was applied by the Supreme Court of Canada in *Martin v. Haubner*, 26 S. C. R. 142. The learned Chief Justice, Sir Henry Strong, says, "the objection to this letter as constituting a sufficient memorandum within the 17th section upon which Mr. Justice Burton has founded his dissenting judgment, is that a writing, though containing a statement of all the terms of the contract requisite to constitute a memorandum of the contract under the statute, cannot be used for that purpose of it repudiates the sale." Mr. Justice Burton had said in his dissenting opinion: "I do not for a moment dispute that a letter repudiating a liability under a contract may nevertheless amount to a memorandum in writing if there is an admission of the contract and its essential terms are stated." But he thought the memorandum in this case was defective because it repudiated the authority of the agent, and as to cases such as *Bailey v. Sweeting* and others referred to in the argument, he had said: "In the cases in which the memorandum under such circumstances has been held sufficient, it will, I think, be found the objection was not to the statement of the contract but to something which had taken place in the performance of it." The precise point is met by Strong, C.J., saying: "Any form of admission provided it contains all that the statute requires, which before the statute would have been admissible if made by parol, must still be admissible if it is in writing and signed by the party making it. Now, irrespective of the statute, it can scarcely be doubted that a statement by a party such

“ as a vendee of goods, to the effect that an alleged agent
“ of the vendee had agreed to purchase from the vendor
“ certain goods for a certain price, would be admissible as
“ evidence against the vendee, although coupled with a
“ repudiation of the authority of the alleged agent, and
“ would be binding on him upon the agency being proved
“ *aliunde*. No doubt the whole conversation in which such
“ a statement might occur might be brought out by the
“ party making the admission, but the repudiation of the
“ agency could not be conclusive, and it would be open to
“ the other party to controvert it by other evidence and
“ there could be no possible reason why the admissions
“ made by the other party to his own prejudice should not
“ be used against him because coupled with a denial of his
“ liability. If this could be done irrespective of the statute,
“ then the enactment by requiring the admission to be in
“ writing cannot have altered the law of evidence as to the
“ admissibility and effect of admissions, which must be the
“ same whether applied to written evidence required by the
“ statute or to parol admissions in cases to which the
“ statute is inapplicable.”

The memorandum must indicate the parties. In *White v. Tomlin*, 19 O. R. 513 (1890), the memorandum of sale of a stock of groceries, provisions, etc., was signed by the defendant, in which the stock was fully described, and by the agreement the defendant was to take in payment for said stock one hundred acres of land occupied by Richard White, being the lot shown to me by W. White, etc., etc. The memorandum was signed by McMahon, the assignor and alleged agent of the plaintiff, after the signature of defendant, and McMahon, some time after the memorandum was signed, wrote a memorandum on the same paper, agreeing to purchase “ the above-mentioned stock, and “ to convey the land intended to be taken in exchange.” This was signed by McMahon. It was held that the memorandum was insufficient, for not indicating the other party to the agreement. “ Evidence may be given to “ identify one of the parties named or described in the “ memorandum of the bargain, but not to supply informa- “ tion in that regard.”

Parol evidence admissible to show situation of parties to contract and meaning of terms used. The case of *Christie v. Burnett*, 10 O. R. 609 (1886), follows the English case of *Newell v. Radford*, L. R. 3 C. P. 52 (1867), in which the relative situations of the parties as vendor and purchaser were ascertained by parol evidence of the occupations of the parties, from which it was inferred that one would be buying and the other selling. Armour, J., said: "Parol evidence is always admissible to show the situation of the parties at the time the writing was made, the circumstances under which it was made, the time when it was made, and the relative trades of the respective parties. . . . We have thus the fact that the plaintiff was a manufacturer of mill machinery, and the defendant a saw miller, and the inference is deducible from their relative trades that the plaintiff was the seller and the defendant the purchaser." Parol evidence was also held admissible to show what the "work" was that one of the letters referred to, which was to be pushed on with all haste. The term "rig" was also interpreted by the use of parol evidence.

Evidence to identify party indicated in memorandum distinguished from evidence to show with whom contract made. The English case of *Williams v. Jordan*, 6 Ch. D. 517, shows that the memorandum must indicate who are the parties to the contract, and although where the parties are indicated parol evidence may be given to identify them. In the case of *White v. Tomalin*, 19 O. R. 513, it was held that the memorandum was defective where it did not show to whom the offer was made which afterwards became a contract. Boyd, C., said: "Evidence may be given to identify one of the parties named or described in the memorandum of the bargain, but not to supply information in that regard," and he mentions the cases of *Wilmot v. Stalker*, 2 O. R. 78, and *Richard v. Stillwell*, 8 O. R. 511, as cases in which he had had occasion to explore this branch of the law.

Oral evidence to construe memorandum. In *Reid v. Smith*, 2 O. R. 69 (1882), the memorandum was of a sale of timber limits, Nos. 1 and 3, North Shore Nipissing, for the sum of \$15,500; "also all the plant used in connection with the shanty now in operation on Limit No. 1, included in the

"list made out last summer," etc., etc. It was held that this memorandum sufficiently described the plant, which could be easily identified by parol evidence, as being that specifically described in a certain writing which accompanied the contract, and which was signed in the firm's name and by the purchaser. The further point would seem from the headnote to have been decided that, although the memorandum would import *prima facie* a down payment of the \$15,500, parol evidence could be given of the terms of credit to be allowed; but it appears from the judgment that the terms of credit were set forth in memoranda put in evidence signed by the defendant firm.

Parol evidence of warranty prior to written contract. The introduction of parol evidence of terms not included in the written contract of sale raises a difficult question, the general principles with reference to which are matters for treatment under the law of evidence. The rule is stated in the text at page 119.

In *Northey Manufacturing Company v. Sanders*, 31 O. R. 475 (1898), the contract was for the sale of a gasoline engine, with a pump standard. The quality and standard of the engine were fully described in the written memorandum of sale, and there was a condition for a trial by the purchaser, with written notice in the event of its being unsatisfactory, whereupon the purchaser should have the right to a new engine unless the defects could be remedied. The purchaser was allowed at the trial to give evidence of a conversation previous to the making of the contract, in which the agent had represented that the engine would, when attached to the pump which was used, pump water sufficient to supply 250 head of cattle, and the jury were told that if they believed this story, the vendors could not recover, and the purchaser would be entitled to damages on his counter-claim. The court held that this evidence had been improperly admitted. Per Street, J.: "The sale
"was of a specific article, by description, and the contract
"must be taken to cover the whole contract between the
"parties. The article which the plaintiffs undertook to
"deliver was a one-horse-power gasoline engine, with
"pump standard, and it is not pretended that the article
"supplied does not answer this description." The negotia-

tions preceding the making of the contract could not be introduced for the purpose of adding to the terms included in the writing.

Parol evidence to vary writing. In *Wilson et al v. Windsor Foundry Co.*, 31 S. C. R. 381, the plaintiffs doing business in Montreal sold a lot of machinery to the defendants, doing business in Windsor, Nova Scotia. The business was transacted through plaintiff's agent, and the order signed by defendant was in the form, "Please furnish one fifty-horse-power engine, for which we agree to pay you \$350, delivered in Halifax. Shipment to be made as soon as possible." Defendants were allowed to set up a parol agreement that the machine was to be paid for not in cash, but by a set-off of a crusher which they supposed the plaintiffs owed them for, plaintiffs doing business under the same name as a Toronto firm to which they had sold a crusher. The Supreme Court of Nova Scotia was equally divided on the question as to the admission of the parol evidence, but the Supreme Court of Canada was unanimous in holding that it had been properly received.

Variance between bought and sold notes. In an action on a contract for the sale of wheat by bought and sold notes, it appeared that the sold note made the wheat deliverable at Montreal afloat "on arrival during the first half of August next," vessel to be named (meaning by the seller), while the bought note made it deliverable "during first half of August next at seller's option." This was held to be a material variance, which avoided the contract. "By the seller's note, he was to deliver the cargo whenever it arrived in the first half of August. By the buyer's note, the delivery was to be whenever the seller chose in the first half of August. It appears to us these are two very different things. Which of the two writings, then, can be said to contain and to express the bargain? The two instruments together are required to form a perfect agreement. When they differ in a material respect the result is, there is no contract." *Butters v. Glass*, 31 U. C. Q. B. 379 (1871.)



CHAPTER V.

OF BROKERS, THEIR BOOKS AND NOTES, AND THEIR AUTHORITY TO SIGN A MEMORANDUM OF A CONTRACT.

It is well settled that a broker for sale is an agent, having the authority of both parties to sign a memorandum of the bargain so as to make the contract good against each.

A broker for sale is a person making it a trade to find buyers for those who wish to sell and sellers for those who wish to buy, and to negotiate and superintend the making of the bargain between them. So far it is clear, that it is for the interest of each party that the broker should discharge his duty effectually. It does not matter which party was the first to employ the broker, the benefit of finding a customer, coming to an understanding with him, and having the contract effectually made is the same for each party. There is, therefore, nothing in the nature of his employment to prevent the broker acting for both parties to this extent.

But in practice he who employs a broker very often gives him a discretion as to the terms on which he is to sell or buy, and when this is the case the broker has to promote an interest hostile to that of the other side. The seller seeks to sell dear, the buyer to buy cheap, and it would be a fraud in the broker to undertake to promote at once these opposite interests; the broker, therefore, cannot act as agent for both parties in settling any of the terms of the contract, unless both parties agree to submit to him as umpire on some point. But though, in exercising any discretion as to the terms of the contract, the broker must be agent for one party exclusively, there is nothing to prevent his still being agent for both parties on those points where their interests are the same. The broker who is trusted to sell at the best price he can get, must be the seller's agent, and his only, in settling

what the price is to be ; but when that is agreed upon, he may well be agent for both buyer and seller in seeing that the terms of the contract are clearly understood and made binding in law.

These considerations show the extent to which it is possible for a broker to be agent for both parties, and the practical question how far the broker actually is agent for one party or for both depends upon actual agreement or mercantile usage. There can be no doubt that the seller and buyer might give the broker authority to bind them by any memorandum whatsoever, and if so they would be bound by any complete memorandum signed by him ; and there can be as little doubt that if they prescribed to him a particular form in which alone he was to bind them, he could bind them by a memorandum in that form and by no other.

In the absence, however, of express directions, he who employs a broker (or indeed any other common agent) must be taken to give him authority to act for him in the manner in which such agents ordinarily do act, and the other party who treats with him has a right to assume that the broker has such authority from his principal, and to hold the principal bound by all acts of his broker not exceeding that apparent authority : if the principal did in fact limit the broker's authority more than usual, it was his business to see that the other side knew of such an unusual limitation ; and in precisely the same manner the customer who enters into a contract through the medium of one whom he knows to be acting as broker for another does by that very act apparently confer on him authority to bind the contract in the manner in which brokers usually bind it. A person employed in the capacity of broker may have authority from his principal to bind the contract in an unusual manner, but such an authority cannot be implied from the mere relation of principal and broker, and requires to be proved by something more than the existence of that relation.

The question, therefore, is, what is the customary authority of brokers ? This may seem to be a mere question of fact, and so it originally was, and still to some extent is ; but

where a trade has been long established, its customs become known to the law, and are judicially taken notice of as a matter of law (a).

The convenience of this is obvious, for if it were necessary to prove as a matter of fact what are the customs of factors, brokers, attorneys, bankers, and similar traders, on every trial in which questions concerning them arise, the delay and expense would be intolerable.

There are, however, some disadvantages attending this rule. The usage may be mistaken at first, or it may change after it has become known to the law, and when that is the case, the difference between the practical custom of trade and that which is taken as the basis of the law, renders the law uncertain. There is, too, a good deal of difficulty in knowing how far the Court does recognise a custom as a matter of law, and how far the custom still requires to be established as a fact.

There is some of this uncertainty in the law of brokers. The law, it is clear, takes notice that they are agents to bind both parties, but there is considerable difficulty in saying what are the precise limits of the broker's authority to do so. It will be seen from the cases collected that some things are well settled whilst others are still in doubt, and probably will remain in doubt till some great cause arises in which the mercantile usage can be ascertained.

The brokers in London have from the earliest times been subject to the control of the corporation. The statutes 6 Anne, c. 16, and 57 Geo. 3, c. 60, both confirmed and limited this control.

Although by the London Brokers' Relief Act of 1870 (b), and the London Brokers' Relief Act of 1884 (c), the control of the Court of Mayor and Aldermen of London over brokers has been determined, so that brokers may now conduct their business free from all control of the corporation, it is thought

(a) *Barnett v. Brandao*, in error, 7 Scott, N. C. 327 ; 12 Cl. & F. 787.

(b) 33 & 34 Vict. c. 60.

(c) 47 Vict. c. 3.

desirable to retain the following passages in the original text relating to that control, for they throw considerable light on the vexed question what is the memorandum of the contract made by a broker, and more especially as it appears to be the custom of brokers since the passing of the Acts to keep a book and note the contracts in it in the same manner as they were compelled to do prior to the passing of the Acts.

The effect of those statutes was to prohibit any person from acting as broker within the City of London and its liberties, unless previously admitted by the Court of Mayor and Aldermen, "under such restrictions and limitations for their "honest and good behaviour as that Court shall think fit and "reasonable." The most important of the restrictions and limitations imposed by the Court was that the party should execute a bond providing for his good behaviour; from 1708 to 1818, the bond was in a form, which may be found in a note to *Kemble v. Atkins* (a). Amongst other things it was conditioned, that "he shall keep a book or register, and "therein truly and fairly enter all contracts, bargains, and "agreements made by him within three days at the furthest "after making thereof, together with the names of the "respective principals for whom he buys or sells, and shall "upon demand made by either of the parties, buyer or seller, "concerned therein, produce and show such entry to them, "to manifest and prove the certainty of such agreements." There is no mention in the old bond of any contract notes. In the year 1818 the regulations were altered, and the amount of the bond much raised; the condition, also, was altered in several respects. The part of the new condition relating to the present subject is as follows—"And shall "keep a book or register, intituled 'The Broker's Book,' and "therein truly and fairly enter all such contracts, bargains, "and agreements on the day of the making thereof, together "with the christian and surname at full length of both the "buyer and seller, and the quantity and quality of the "articles sold or bought, and the price of the same, and the

(a) *Kemble v. Atkins*, Holt, N. P. 431.

“ terms of credit agreed upon, and deliver a contract note to
“ both buyer and seller, or either of them, upon being
“ requested so to do, within twenty-four hours after such
“ request, respectively containing therein a true copy of such
“ entry : And shall, upon demand made by any or either of
“ the parties, buyer or seller, concerned therein, produce and
“ show such entry to them or either of them, to manifest
“ and prove the truth and certainty of such contracts and
“ agreements.”

The contract notes here mentioned, which are to be a copy of the entry and delivered at any time upon request, must not be confounded with the bought and sold notes which are or ought to be made out at the time of making the contract, and generally as soon as or before it is entered in the book. There is no mention in either the bonds or regulations of the bought and sold notes.

Throughout the rest of the British empire the trade of brokers is absolutely free, any person may practise it and in any manner, subject to the customs of trade. The broker in London is also subject to the customs of trade, which were by no means identical with the regulations of the Court of Mayor and Aldermen. The statutes prohibited acting as broker in London without admission ; if, therefore, any person acted as broker without admission, he acted illegally (*a*), for he broke a statute ; but if, being admitted, he transgressed the regulations, he forfeited his bond or might be dismissed from being a broker, but he did not act illegally (*b*), for he only broke a municipal regulation.

The bond and regulations, therefore, did not have the effect of rendering any custom of trade illegal, or of preventing its efficacy even in London, if it did in point of fact prevail there. It is, however, not likely that any general custom should have prevailed in London the observance of which would imply that brokers habitually forfeited their bonds.

(*a*) *Cope v. Rowlands*, 2 M. & W. 149. See also *Smith v. Lindo*, 27 L. J. C. P. 196—335 ; 4 C. B. N. S. 395 ; affirmed in 5 C. B. N. S. 587.

(*b*) *Ex parte Dyster*, 2 Rose, 348.

These observations will be found to have some bearing on a point on which there has been some difference of judicial opinion, namely, whether the entry in the broker's book, if signed by him, is in itself a sufficient memorandum of the contract signed by an agent authorized by both parties : in other words, whether the entry in the book is made as an authentic memorandum of the contract between the parties, or merely as a means for ensuring the honest and good behaviour of the broker.

As far as the regulations were concerned, it may be observed, that the Mayor and Aldermen had no authority whatever to regulate the course of dealing between buyer and seller ; all that they were authorized to do was to provide means for ensuring "the honest and good behaviour of the broker." Had the regulations, therefore, in express terms provided that the broker should sign his book as agent for the buyer and seller, it would have conferred on him no authority to bind them, unless the buyer and seller either expressly or by usage authorized him to do so. However, on looking at the terms of the bonds it will be seen, that the regulations about the broker's book were very well framed if meant as a check upon the broker, but not at all artificially framed if meant to provide a means of satisfying the Statute of Frauds. Neither the old nor the new bond required that the entry should be either written or signed by the broker, the condition would be fully complied with by an entry being made under the broker's sanction in his book by any third person and not signed at all. The old bond allowed the entry to be made at any time within three days after the contract was made, and the modern bond provided for the delivery of contract notes at any time ; so that the entries under the old bond and the notes under the new one might well be made after the broker's authority had expired. These are not objections to the value of the entry in the broker's book and the copies of it as evidence against the broker, but seem serious obstacles to its being used between party and party.

If, therefore, a signed entry in the broker's book were

evidence between the buyer and seller, it must have owed its weight not to the regulations of the Mayor and Aldermen, but to some custom to consider it as a memorandum between them. In a case in which the point was discussed (*Thornton v. Charles (a)*, in 1842), Parke, B., seemed to be of opinion that such a custom was recognised as a part of the law. Lord Abinger expressed a contrary opinion, and there was no decision. In *Gregson v. Ruck (b)*, in 1843, it seems to have been assumed without discussion that the bought and sold notes, exclusively of the broker's book, formed the contract; and that seems the general opinion.

A precise and accurate broker, when he has made a contract, reduces the terms to writing, and delivers to each party a copy signed by him.

The copy delivered to the seller is generally called the sold note; that which he delivers to the buyer is generally called the bought note. Besides these, he makes an entry in his book. There is no particular form requisite in the broker's bought and sold notes, but from the cases there appear to be three varieties used in practice which are substantially different.

The first is where on the face of the notes the broker professes to be acting as broker for two persons whose names are disclosed on the notes; the sold note, then, in substance is in this shape:—"Sold for A. B. to C. D.," containing the terms of the contract, and the bought note is, "Bought for C. D. of A. B.," and both are signed by the broker.

The second is where the broker on the face of the bought note professes to be, as broker, buying of some principal whose name does not appear on the bought note, and on the sold note professes to be, as broker, selling to some principal whose name does not appear on the sold note; the notes are then in form:—"Bought for C. D.," and "Sold for A. B."

These two forms seem about equally common. The reader will find instances of the first in *Powell v. Divett (c)*, *Thornton*

(a) *Thornton v. Charles*, 9 M. & W. 807.

(b) *Gregson v. Ruck*, 4 Q. B. 737.

(c) *Powell v. Divett*, 15 East, 29.

v. *Kempster* (a), *Hawes v. Forster* (b). There are instances of the second form in *Favenc v. Bennett* (c), *Morris v. Cleasby* (d), *Boyson v. Coles* (e), *Thornton v. Charles* (f), *Trueman v. Loder* (g).

In either case the person who receives and keeps such a note must be taken to know that the person signing it is acting as his broker, and to authorize him to do so: the broker, by the form of his note, says, "I have sold for you," and as a matter of evidence it is clear that silence in such case is assent to this assumption of authority; but there is some difference in the manner in which the notes must be used as a memorandum to satisfy the Sale of Goods Act. When the name of both parties appears disclosed on the notes, each of them separately is a complete memorandum of the contract, and the only question is, whether the broker signed it as an agent for the party sought to be charged. In *Hawes v. Forster* (b), in 1832, it was decided that proof that the broker delivered to the buyer a bought note, containing the names of the seller and buyer, and was employed by the seller, was sufficient to charge the seller, it being proved that there was a sold note, though its contents were not in evidence. Whether a bought note would be sufficient when there was no sold note at all is a disputed point.

But it seems to be different when the note does not disclose the name of both parties; there the note, as a memorandum, is defective from not showing who the contracting parties are, and it is doubtful whether the signature of the broker's name supplies the deficiency, for he does not profess to sign as contracting party at all, but merely as an agent (h). The form of the note and the custom of trade show that there is a

(a) *Thornton v. Kempster*, 5 Taunt. 786.

(b) *Hawes v. Forster*, 1 M. & R. 363.

(c) *Favenc v. Bennett*, 11 East, 36.

(d) *Morris v. Cleasby*, 4 M. & S. 566.

(e) *Boyson v. Coles*, 6 M. & S. 14.

(f) *Thornton v. Charles*, 9 M. & W. 802.

(g) *Trueman v. Loder*, 11 A. & E. 589.

(h) The broker cannot sue in his own name on such a note, *Rayner v. Linthorne*, R. & M. 325. The same point seems to follow from the case of *Morris v. Cleasby*, 4 M. & S. 566.

corresponding note to which this refers, and if it be proved the two clearly form a complete memorandum; but if only one note exists, or what comes to the same thing, if one only is in evidence, it is very doubtful whether the statute is satisfied. This objection is entirely technical, and cannot be altered or obviated by any mercantile custom.

If the note be in form a complete memorandum, as it was in *Hawes v. Forster* (a), the doubt is, whether the authority of the broker to bind the parties by signing the bought note is not by custom conditional on his signing and delivering a sold note so as to put both parties on an equality. If the authority is absolute one note would bind the parties, though there was no other; if it is conditional it would not. In *Gregson v. Ruck* (b), the Queen's Bench seem to have inclined to think that the production of a sold note, and proof that the buyer received the goods afterwards from the broker, was not sufficient to show that the broker signed the sold note as agent for the buyer without proof that he accepted a bought note, or in some other way showed that he was dealing with the broker as his broker, but the point seems not to have been decided.

The third form in which brokers sometimes make out their contract notes, is where the sale is made in the broker's name, so that on the face of the written contract he purports to be selling as principal. In the two previously mentioned forms, the broker, on the face of the note, says, "I am contracting for you with a principal;" in the first he gives the name of the principal, in the second he does not, but in each case he professes on the face of the writing to be selling as an agent. But it is not uncommon for a broker to sell or buy as a broker, and yet to make out the notes in his own name. Instead of rendering to the buyer a bought note in the form "Bought for you by me," he renders him one in the form "Sold to you by me." By doing this he pledges his own

(a) *Hawes v. Forster*, 1 Mo. & Rob. 368. The form there was "bought for Messrs. B. T. & W. Hawes, of Messrs. Forster & Smith, from 80 to 100 tons, &c.," signed by the broker.

(b) *Gregson v. Ruck*, 4 Q. B. 737.

personal credit to the party, for, having entered into a written contract in his own name, he cannot discharge himself by showing that he entered into it as agent only, however well that may have been known to all parties at the time (a).

But the case of a broker making a note in his own name, so as to render himself a party to the contract, is a very different one from that of a broker dealing as principal. When a principal authorizes an agent to sell goods, as if the agent were principal, third persons are led to give the agent the same credit as if he were principal, and if any loss arises from their doing so, it is the principal's fault, and he must bear the loss. If, for instance, a person who in respect of a transaction is, in truth, a debtor to the undisclosed principal, but believes himself to be a debtor of the agent, and under that belief gives the agent credit, or does not press for the payment of his former credits, that is to say, treats the outstanding debt due from the agent to him as set off against the debt from him to the agent incurred in this transaction, and the agent becomes insolvent, it is clearly just that the principal should make that person the same allowances and deductions which the principal led him to believe he would have from the agent with whom he supposed himself to be dealing as principal (b). And the same principle applies where the debtor knows that the person with whom he contracts is not a principal, but the agent is authorized by his principal to represent that he has an interest in the contract. The principal must allow the same deductions which must have been made if the agent had the interest he was authorized to appear to have. The justice of this is pretty obvious, and the law is in agreement with justice (c). But the contracting party has no right to compensation from the principal for losses arising from credit he may have given to the agent after he was aware that he had entered into the con-

(a) *Higgins v. Senior*, 11 L. J. Ex. 199 ; 8 M. & W. 444.

(b) See Smith's Law of Contracts, Lecture X.

(c) *Warner v. McKay*, 1 M. & W. 592 ; *George v. Claggett*, 7 T. R. 359.

tract merely as agent; all that he has a right to claim is, to make those deductions which at the time of the disclosure of the true state of the case he would have had a right to make against the agent, had what the principal led him to believe been really true.

The difference, therefore, between a broker dealing in his own name but at the same time letting it be known that he is but a broker, and dealing as a principal, is marked. If he contracts as a principal, it is clear that a person with whom he contracts cannot be supposed to confer on him any authority to sign a memorandum of the contract as agent for both parties, for he does not know that there is another party: so that, as far as regards the fourth section of the Sale of Goods Act, a sale by or to a broker who deals as principal in no respect differs from a sale to or by a principal himself. Whether the true principal whose existence was not disclosed be bound by such a sale or not, depends on different considerations. The question generally is, whether he has clothed the broker with a real or apparent authority to deal as principal, but that question is foreign to the present subject.

But a contract made by one known to be acting as broker for a principal, though entered into in the name of the broker, is different: the broker by the form of the written documents becomes a party to the contract, and the forms of action and pleading may be rendered different, but in substance the effect is no more than if the contract had been made in the name of the principals, and the broker had guaranteed the due performance of the contract. The rights of the parties and of the broker are the same if all parties have notice of the truth, though the remedy may be changed.

A broker has no right capriciously to vary the remedies of his principal, and therefore he has no right to volunteer to become a party to the contract. If, therefore, it is sought to fix the principal with a contract made in the name of the broker, there must be some proof that the broker had authority from the principal to contract in that manner. The practice is so common and so convenient, that it needs no

strong evidence to show the principal's assent, but still it is apprehended there must be some evidence (a).

The person who enters into a contract with a broker in the broker's name, but knowing that the broker is acting as a broker for a principal, may well give the broker authority to sign a memorandum of the contract for him; but the form of the note does not by itself show that he gives him such authority. If the buyer takes a bought note in the form, "Bought for you by me," the mere acceptance of such a note furnishes evidence that he gave the person signing it a broker's powers. But if he takes a note in the form, "Sold to you by me," there must be some extraneous evidence to show that he authorized that person to bind him as a broker, for the note does not show this. All that can be said of it is, that it does not show the contrary.

The reported cases, upon the nature of the authority of the broker as an agent, authorized to sign a memorandum within the 17th section of the Statute of Frauds, are not so numerous as might be expected, insomuch that an attempt may be made to collect them all.

The first case on the point was that of *Rucker v. Cammeyer* (b), at Nisi Prius, before Lord Kenyon in 1794. It was an action by the seller against the buyer of sugar. It was proved that the plaintiff's broker, after bringing the parties together, made out bought and sold notes, and that the defendant sent for and took away the bought note. An objection was taken that the Statute of Frauds was not satisfied, but Lord Kenyon said "that *Simon v. Motivos* (c) ruled the point." He said, "the broker must be considered the agent of both parties; but that he had in this case in fact given the defendant a note in writing when he gave him the sale note, which he had accepted." It is not in express terms said in the report whether there was a signed entry in the broker's book

(a) *Kemble v. Atkins*, 7 Taunt. 260; *Johnston v. U'sborne*, 11 A. & E. 549.

(b) *Rucker v. Cammeyer*, 1 Esp. 105.

(c) The decision in *Simon v. Motivos*, W. Bl. 599, 3 Burr. 1921, ante, p. 2, in terms applied to sales by auction only.

in evidence or not; but if there was, it seems that no weight was attached to it, at least by the reporter.

In *Hicks v. Hankin* (a), at Nisi Prius, before Heath, J., in 1802, the plaintiff, Hicks, employed Taylor (who in the report is described as a malt factor) to sell his malt at Storford Market. Taylor gave the plaintiff a note in the following terms:—"Sold Mr. George Hankin 320 quarters of Hicks's Malt at 79s. J. Taylor," and he gave the defendant what in the report is called a duplicate of it. Heath, J., said this was sufficient to bind the contract, "as Taylor was agent for both parties in making the contract, and his signing was therefore valid."

The next case was *Chapman v. Partridge* (b), at Nisi Prius, before Mansfield, C. J., in 1805. It was an action for not delivering sumach. The defendant's partner (his brother's widow) entered into a treaty with the plaintiff for the sale to him of some sumach belonging to the partners. She then told one Aylwin that he was to be the broker between them. Some days after, the plaintiff told Aylwin that he had made a contract with her. Aylwin sent her a sold note containing the terms of the contract as the plaintiff stated them. She did not return it, and some days after said she was sorry, as her brother-in-law was angry at what she had done: on this being proved, Mansfield, C. J., said, "The note in writing may be received, it is signed by the broker, and the only question is, if it was signed by the authority of the defendant's partner. It is in evidence that she had consented that Aylwin should act as broker, that authority might be countermandable, but when he does act as agent to her in making the bargain, and she receives the sale note, she does not refuse it or send it back, but in two days after expresses her sorrow for having done it. The jury must say if Aylwin had any authority from the widow to make the contract, or if what passed then was a recognition of his authority, which would be the same thing as if she had given him directions at first." The plaintiff recovered.

(a) *Hicks v. Hankin*, 4 Esp. 114.

(b) *Chapman v. Partridge*, 5 Esp. 256.

In this case also it seems that the broker's book was not relied on.

The next case, in order of time, was *Klinitz v. Surrey* (a), at Nisi Prius before Lord Ellenborough, in 1805, which is somewhat differently reported in *Espinasse* and in *Paley on Agency*: it was an action by the seller of corn against the buyer. It seems that the sale was made by the seller's factor or broker entrusted with the possession of the goods, and that Lord Ellenborough decided that the factor was not *prima facie* an agent of the buyer, but that in the case there was sufficient evidence to show that the buyer adopted him as his agent; and also that an entry in his book not containing the names of the parties was a defective memorandum. After all the case went to the jury, and the defendant had a verdict on the merits. The case, therefore, decided nothing, but it is worthy of note as being the first reported case in which any attempt was made to use the broker's book as a memorandum between the parties.

In *Hinde v. Whitehouse* (b), in 1806, which was a case of a sale by auction, Lord Ellenborough, in delivering judgment, says, that "In all sales made by brokers acting between the parties, buying and selling, the memorandum in the broker's book, and the bought and sold notes transcribed therefrom, and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute to render the contract of sale binding on each."

The turn of the expression seems to show that Lord Ellenborough, at the time of delivering the judgment, A.D. 1806, considered the book as of some weight between the buyer and seller, and perhaps as of more weight than the notes.

This opinion seems to have gained strength in his mind, and in 1809, in *Heyman v. Neale* (c), at Nisi Prius, he is reported to have said, "After the broker has entered the contract in his book, I am of opinion that neither party can recede from it. The bought and sold note is not sent on

(a) *Klinitz v. Surrey*, 5 Esp. 266; *Paley*, p. 171.

(b) *Hinde v. Whitehouse*, 7 East, 569.

(c) *Heyman v. Neale*, 2 Camp. 337.

“approbation, nor does it constitute the contract. The entry “made and signed by the broker, who is the agent of both “parties, is alone the binding contract; what is called the “bought and sold note is only a copy of the other, which “would be valid and binding, although no bought or sold “note was ever sent to the vendor and purchaser.” The plaintiff was, however, nonsuited on another ground, so that this ruling became immaterial. In 1816, Gibbs, C. J., apparently alluding to this case, said (Holt, 173) that the case had been contradicted; it does not, however, appear that Lord Ellenborough himself ever expressly abandoned his former opinion.

In 1810, in *Hodgson v. Davies* (a), at Nisi Prius, the sale was through a broker, who rendered bought and sold notes, by which Davies sold to Hodgson, payment to be by bill. Five days after the delivery of the notes, Davies returned the sold note, and, as far as then lay in his power, repudiated the contract. Lord Ellenborough at first thought that the contract must be absolute, unless the broker's authority was expressly limited, and the plaintiff had notice of it; but on an expression of opinion by the special jury, he assented to a custom which gave the seller a right within a reasonable time to return the notes when the sale was on credit. This case is not a decision that the book is not the original contract, but it is one that might well shake Lord Ellenborough's confidence in his former opinion. It will be found that Lord Ellenborough does not in any subsequent case act on the doctrine that the book is the original, though certainly he nowhere says it is not.

In 1812 two cases came before the full Court of King's Bench, which are perhaps more remarkable for what they did *not* decide than for what they did.

The first was *Powell v. Divett* (b). It was proved at the trial that the broker delivered to Powell and Co. a sold note in the following form:—“Messrs. Powell and Co., sold for

(a) *Hodgson v. Davies*, 2 Camp. 531.

(b) *Powell v. Divett*, 15 East, 29.

“your account to Messrs. Divett and Co. the following parcels
“of Spanish wool (specifying them and the rates of price),
“customary tare and allowance to be paid for by acceptances
“at six and eight months.” This note was signed by the
broker: he delivered at the same time a bought note to the
defendant, which was not in evidence at the trial. After
the sale Powell and Co. induced the broker to add a clause to
the sold note, to the effect that such part of the wool as was
damaged should be taken at a valuation. When Divett
and Co. heard of this they objected. The declaration contained
counts both on the original and on the altered notes. Lord
Ellenborough, on these facts being proved, was of opinion
that the alteration of the written document annulled the con-
tract, and he nonsuited the plaintiff. It was urged in banc
that according to *Heyman v. Neale* (a) the note was not the
contract, and consequently that an alteration in it could not
annul the contract. The Court granted a rule nisi for a new
trial, but on the argument it being brought to their notice
that the entry in the broker’s book was not signed, and that
the bought note was not in evidence, the Court discharged
the rule because, whether the vitiation of the sold note de-
stroyed the contract or not, it put an end to the only evidence
produced at the trial to satisfy the statute. The Court ab-
stained from saying what would have been the case if the
bought note had been in evidence, and it is, perhaps, not too
much to conjecture that they were not quite agreed upon that
point. Had it been decided, the Court must have determined
whether the two notes formed the contract, or whether each
separately was a memorandum of it, but not a part of the
contract.

In *Humphries v. Carvalho* (b) the defendant’s broker on the
Saturday gave the plaintiff a bought note of some ipecacuanha,
“quality to be approved on Monday.” He met the defendant,
and told him what he had done, and therefore did not consider
it necessary to send him a sold note. On the Friday follow-
ing he sent the defendant a sold note, with the words “quality

(a) *Heyman v. Neale*, 2 Camp. 337.

(b) *Humphries v. Carvalho*, 16 East, 45.

“to be approved on Monday” struck out, to signify that the buyer had approved it; the defendant immediately returned it, alleging as his reason that it had not been sent to him on Monday. The plaintiff had a verdict, and though a motion was made on another point, nothing was said in banc as to the Statute of Frauds. It does not appear from the report whether the bought note contained the names of both the buyer and seller, though it most probably did. The case seems an authority for this proposition, that one note only is sufficient to bind the contract when the party to be charged has expressly or tacitly dispensed with the delivery of the other note.

In 1814 the Court of Common Pleas came to an important decision. In *Thornton v. Kempster* (a) the broker had delivered to the plaintiff a complete sold note for a sale of Petersburg hemp, signed by him; he delivered to the defendants a bought note, signed by him, corresponding in every particular with the sold note, except that it was for a purchase of Riga hemp. Riga and Petersburg hemp are different articles. The broker meant to have made both notes for the sale of Petersburg hemp, but he made a mistake in writing out the bought note. The Court of Common Pleas decided that there was no contract, because on the notes the parties were not agreed; Thornton was to sell one thing and Kempster to buy another, but to make a contract of sale the parties must agree to buy and sell the same thing. In *Cumming v. Roebuck* (b), Gibbs, C. J., at Nisi Prius, in 1816, ruled the same point and remarked, “There is a case which states the entry in the broker’s book to be the original contract, but it has been since contradicted.” He probably alluded to Lord Ellenborough’s ruling in *Heyman v. Neale* (c) (ante, page 96), which certainly seems quite at variance with the decision in *Thornton v. Kempster*. It does not appear whether the broker’s book in *Thornton v. Kempster* (a) was in evidence or not; the expressions of Gibbs, C. J., in *Cumming v. Roebuck* (b),

(a) *Thornton v. Kempster*, 5 Taunt. 786.

(b) *Cumming v. Roebuck*, Holt, 172.

(c) *Heyman v. Neale*, 2 Camp. 337.

above quoted, seem to show that he at least thought it of no weight between the parties (a).

In 1815 (b) Lord Ellenborough, at *Nisi Prius*, reserved the point whether a sold note was sufficient to bind the seller where there was neither a bought note nor an entry in the book, but the plaintiff was nonsuited on another ground, so that the point became immaterial.

In *Grant v. Fletcher* (c), in 1826, the broker made a jotting of part of the contract in his note-book, gave the plaintiff a memorandum containing another part of the contract, and the defendant a memorandum of another part; each of the papers was imperfect, they did not refer to each other, and each was inconsistent with each of the other two. The plaintiff was, of course, nonsuited, but Abbott, C. J., in delivering judgment said, "The entry in the broker's book is, properly speaking, the original, and ought to be signed by him; the bought and sold notes delivered to the parties ought to be copies of it. A valid contract may probably be made by perfect notes, signed by the broker and delivered to the parties, although the book be not signed."

In *Goom v. Aflalo* (d), in 1826, this point was decided. In that case the bought and sold notes were perfectly regular and complete, and in the same terms as an entry in the broker's book, which was unsigned. The Court of King's Bench took time to consider, and then Abbott, C. J., delivered judgment that the contract was good. He said, "It is clear that the contract was made in such a manner as to bind the defendant within the requisites of the Statute of Frauds. If, therefore, it is to be held invalid, this can only be done on the ground of some usage or custom of merchants, which the Court is at liberty to recognise as part of the common

(a) If there was a signed entry in evidence in *Thornton v. Kempster* (5 Taunt. 786), the decision seems to be that when the bought and sold notes differ there is no contract. It is now unquestioned law that when they differ they do not afford evidence of a contract, but it seems that Parke, B., does not admit the more extended proposition. See *Thornton v. Charles*, 9 M. & W. 802.

(b) *Dickenson v. Liwui*, 4 Camp. 279; 1 Starkie, 128.

(c) *Grant v. Fletcher*, 5 B. & C. 436.

(d) *Goom v. Aflalo*, 6 B. & C. 117.

“ law. No such usage has been found stated as a fact upon
“ the present occasion. There are several cases in the books
“ in which this point has been noticed; they were all cited
“ at the Bar, and it is unnecessary to repeat them. A
“ signed entry in the broker’s book, and signed notes con-
“ formable to each other delivered to the parties, are spoken
“ of as making a valid contract. The entry in the book has
“ been called the original, and the notes copies, but there is
“ not any actual decision that a valid contract may not
“ be made by notes duly signed, if the entry in the book be
“ unsigned; and in one case the late Lord Chief Justice
“ Gibbs is reported to have spoken of some supposed decision
“ to that effect as having been overruled. Under such cir-
“ cumstances we cannot say that the rule for which the
“ defendant contends has been adopted by the Court as part
“ of the law merchant. Strong expressions as to the duty
“ of the broker to sign his book do not go far enough
“ for this purpose, nor does the obligation to do this which a
“ broker is supposed to enter into upon receiving a licence to
“ practise in the City of London. Brokers are, I believe,
“ established in the principal commercial towns on the
“ Continent, under municipal regulations, calculated to obtain
“ punctuality and fidelity in their dealings, and the signature
“ of their book is certainly one method of insuring these,
“ and may in some cases furnish evidence and facilitate the
“ proof of a contract. We have no doubt that a broker
“ ought to sign his book, and that every punctual broker will
“ do so. But if we were to hold such a signature essential to
“ the contract we should go further than the Courts have
“ hitherto gone, and might possibly lay down a rule that
“ would be followed by serious inconvenience, because we
“ should make the validity of the contract to depend upon
“ some private act of which neither of the parties to the
“ contract would be informed, and thereby place it in the
“ power of a negligent or fraudulent man to render the
“ engagements of parties valid or invalid at his pleasure.”

A few months afterwards, in a case at *Nisi Prius* (a),

(a) *Thornton v. Meux, Moo. & Malk.* 74.

Abbott, C. J., refused to receive the broker's book in evidence where there were bought and sold notes which differed. He said, "I used to think at one time that the broker's book was the proper evidence of the contract, but I afterwards changed my opinion, and held conformably to the opinion of the rest of the Court, that the copies delivered to the parties were the evidence of the contract they entered into, still feeling it to be a duty in the broker to take care that the copies should correspond. I think I must still act upon that opinion and refuse the evidence." The fact that the Chief Justice was induced to abandon his preconceived opinion adds much weight to the decision of *Goom v. Aflalo* (a), as it shows that the case was well considered. It also completely destroys the authority of his dicta in *Grant v. Fletcher* (b), as they were only expressions of an opinion which upon consideration he changed.

It may be convenient here to examine what the state of the authorities was immediately before the decision of *Goom v. Aflalo* (a).

It seems to have been decided at Nisi Prius in *Rucker v. Cammeyer* (c), *Hicks v. Hankin* (d), and *Chapman v. Partridge* (e), that the broker might bind the parties without making any entry in his book. It had never been so decided in banc. The dictum of Lord Ellenborough in *Hinde v. Whitehouse* (f), and his ruling in *Heyman v. Neale* (g), afford an inference that his opinion was at one time the other way; but the subsequent cases of *Powell v. Divett* (h), *Humphries v. Carvalho* (i), and *Dickenson v. Lilwal* (k) show that he considered it by no means a point to be hastily decided. The

(a) *Goom v. Aflalo*, 6 B. & C. 117.

(b) *Grant v. Fletcher*, 5 B. & C. 436.

(c) *Rucker v. Cammeyer*, 1 Esp. 105.

(d) *Hicks v. Hankin*, 4 Esp. 114.

(e) *Chapman v. Partridge*, 5 Esp. 256.

(f) *Hinde v. Whitehouse*, 7 East, 558.

(g) *Heyman v. Neale*, 2 Camp. 337.

(h) *Powell v. Divett*, 15 East, 29.

(i) *Humphries v. Carvalho*, 16 East, 45.

(k) *Dickenson v. Lilwal*, 4 Camp. 279.

case of *Thornton v. Kempster* (a), coupled with the expressions of Gibbs, C. J., in *Cumming v. Roebuck* (b), seems to show that Gibbs, C. J., was inclined to go the full length of excluding the broker's book altogether as evidence between buyer and seller. It is somewhat remarkable that there is no reported decision, not even at Nisi Prius, that the broker's book is admissible as evidence between the parties. Lord Ellenborough at one time evidently thought it was not only admissible but conclusive, but it never formed the ground of any reported decision of his. In *Klinitz v. Surrey* (c), the ruling was on the acceptance of a bulk sample; in *Heyman v. Neale* (d) the plaintiff was nonsuited on another ground. An opinion of Lord Ellenborough's, if it stood alone, would have very great weight, but against it is to be placed the opinion of Chief Justice Gibbs, and the more mature and deliberate opinion of Lord Tenterden. The decision of *Goom v. Aflalo* (e) put an end to doubt on the point there decided, namely, that where there is no signed entry in the broker's book, the bought and sold notes make the contract: from some expressions of Parke, B., it seems that the learned Judge doubted if the case was originally right, but he seems not to question that so far it was too well established to be overthrown. But the inference to be drawn from the reasoning of the Court in *Goom v. Aflalo* (e), and acted upon in *Thornton v. Meux* (f), viz., that the entry in the broker's book, being a private act of which neither of the parties to the contract would be informed, ought not to affect the parties, has been much questioned by him.

This point was much considered in the case of *Hawes v. Forster* (g), in the King's Bench. That was an action for not delivering oil. The first time it was tried in 1832, the plaintiffs produced and proved a bought note for the sale of

(a) *Thornton v. Kempster*, 5 Taunt. 786.

(b) *Cumming v. Roebuck*, Holt, 172.

(c) *Klinitz v. Surrey*, 5 Esp. 266.

(d) *Heyman v. Neale*, 2 Camp. 337.

(e) *Goom v. Aflalo*, 6 B. & C. 117.

(f) *Thornton v. Meux*, Moo. & Malk. 44.

(g) *Hawes v. Forster*, 1 M. & R. 368.

oil to them "warranted to arrive on or before 30th June." The sold note was not in evidence, and the defendants' counsel, besides relying on that objection, offered to put in the broker's book to contradict the note, and show that the warranty was not part of the contract. This evidence was rejected by Lord Denman. The Court of King's Bench were much divided in opinion, but finally they granted a new trial, in order that mercantile evidence might be received, and the question, if necessary, carried to a Court of error. At the new trial in 1834 the sold note was proved in evidence, and the jury found as a fact that, according to the usage of trade, the bought and sold notes were the contract, and not the broker's book, which the evidence showed was in practice never referred to, and the plaintiffs recovered, although the defendants proved that the entry did not correspond with the note. The defendants did not attempt to question this verdict.

The point underwent some more discussion in *Thornton v. Charles* (a), 1842. In that case there was a sold note, by which Thornton sold to the broker's unnamed principal 200 casks of tallow, and a bought note, by which Charles bought of the broker's principal 50 casks; the fact was that the broker made three contracts of sale from Thornton to three different persons, and delivered only one sold note, but three bought notes. He entered the true contracts in his book and signed them; Lord Abinger nonsuited the plaintiff because the bought and sold notes did not correspond, and he thought the broker's book nothing. The Court of Exchequer all agreed in granting a new trial on another ground. On the main point, however, Parke, B., and Lord Abinger differed. Parke, B., said, "I apprehend it has never been decided that "the note entered by the broker in his book, and signed by "him, would not be good evidence of the contract so as to "satisfy the Statute of Frauds, there being no other. The "case of *Hawes v. Forster* (b) underwent much discussion in

(a) *Thornton v. Charles*, 9 M. & W. 802.

(b) *Hawes v. Forster*, 1 M. & R. 368.

"the Court of King's Bench, when I was a member of that Court, and there was some difference of opinion among the Judges, but ultimately it went down to a new trial to ascertain whether there was any usage or custom of trade which makes the broker's note evidence of the contract. In that case there was a signed entry in the book which incorporated the terms of making the contract void in the event of the non-arrival of the goods within a certain time. The bought and sold notes which were delivered to the parties omitted that clause. Certainly it was the impression of part of the Court that the contract entered in the book was the original contract, and that the bought and sold notes did not constitute the contract. The jury found that the bought and sold notes were evidence of the contract, but on the ground that those documents, having been delivered to each of the parties after signing the entry in the book, constituted evidence of a new contract made between them on the footing of these notes. That case may be perfectly correct, but it does not decide that if the bought and sold notes disagree, or (*and?*) there be a memorandum in the book made according to the intention of the parties, that memorandum signed by the broker would not be good evidence to satisfy the Statute of Frauds." Lord Abinger was of a different opinion; he said, "I have purposely avoided" (*i.e.*, in his judgment delivered previously to that of Parke, B.) "giving any opinion about the question of the bought and sold notes; but I desire it to be understood that I adhere to the opinion given by me, that when the bought and sold notes differ materially from each other, there is no contract unless it be shown that the broker's book was known to the parties."

The dicta of these two learned Judges are worthy of the more attention, because though the case did not call for a judgment upon the point, it seems that the contradictory opinions there expressed had been deliberately formed and long entertained. It may be remarked, however, that upon this occasion Mr. Baron Parke's account of the second trial of

Hawes v. Forster (a) is at variance with the report usually received on very good authority.

If the report of *Hawes v. Forster* (a), in the Reports of *Moody* and *Robinson*, be correct, that case can scarcely have been decided by the finding of the jury that the broker's notes were evidence of a new contract substituted in lieu of a previous binding contract entered in the broker's book, for the evidence was that the broker could not tell which was first written, though it was all on the same day. It is not inconsistent with the terms of the report that the evidence may have shown that the notes were actually delivered to the parties a short time after the entry was signed; yet if the jury found a substitution of a contract on that ground, it was a somewhat subtle verdict, and the point, if left to them, would surely have been mentioned in the report. According to the report, the evidence was all on one side, and "several "of the most eminent merchants in the city all concurred in "declaring that they had never known any instance where "the broker's book had been referred to, and that they "always looked to the bought and sold notes of the contract." And the question was left to the jury in these terms:—"Which according to the usage of trade in this city has been "the binding contract, the broker's book, or the bought and "sold notes? If the evidence has satisfied you that accord- "ing to the usage of trade the bought and sold notes are the "contract (and the evidence adduced before you to show "that they are so considered, has not been met by any con- "tradictory evidence from the other side), then you will "find your verdict for the plaintiffs.

"Verdict for the Plaintiffs."

This differs very materially from the statement reported to have been made by Mr. Baron Parke, in *Thornton v. Charles* (b), as it is submitted that this was not a "finding by the jury that "the bought and sold notes were evidence of the contract on

(a) *Hawes v. Forster*, 1 M. & R. 368.

(b) *Thornton v. Charles*, 9 M. & W. 802.

"the ground that these documents, having been delivered to each of the parties after the signing of the book, constituted evidence of a new contract made between them on the footing of these notes," but a direct finding of a mercantile jury under the direction of the Chief Justice, that the entry in the broker's book is not, according to usage, the contract.

If it could be shown that by the general law merchant a broker was bound to make an entry in his book, and that by the law merchant such an entry was the record of the contract between the parties, it might come to be a question whether the custom of England to disregard the book was to prevail against the general law merchant; but there are no indications of such being the general law merchant (a).

(a) [The following note was added in the original edition of this work, and retained in the second edition. As it is of some interest, it has been retained here in its original form.] There has not come to my notice any passage in the old French or civil law to show that such a book was recognised in their law, but I have made too little search to be able to rest on this as affording a presumption that it was not a part of the law merchant. The Dutch and Italian law might probably afford more assistance, but I am ignorant of those languages. In Van der Linden's Law of Holland, by Henry, p. 565, it is said, that the brokers of Amsterdam are "bound to keep a proper register of all their transactions, to serve as proof in case of dispute." Lord Tenterden, however, in *Goom v. Aflalo* (6 B. & C. 117), seems to consider this a mere municipal regulation.

The Code Napoléon is very precise in its directions as to the books of brokers, but not more so than with regard to those of other traders (as may be seen by the extract printed below); and there seems no fair inference to be drawn one way or the other from a system so radically different from our customs, both of trade and law. It is difficult to say, whether an English merchant who was compelled to submit his stock-book, journal, and the private book of his household expenses, once a year, to be examined by the Mayor and Recorder or a Master in Chancery, or an English lawyer, required to give credence to traders' books as proof of what was stated in them, would be most inclined to resent the order as unnatural.

Code de Commerce, Livre I., Titre deuxième.—"Du Livre de Commerce."

8. Tout commerçant est tenu d'avoir un livre journal qui présente jour par jour ses dettes, actives et passives, les opérations de son commerce, ses négociations, acceptations, ou endossements d'effets, et généralement tout ce qu'il reçoit et paie, à quelque titre que ce soit; et qui énonce mois par mois les sommes employées à la dépense de sa maison: le tout indépendamment des autres livres usités dans le commerce, mais qui ne sont pas indispensables.

Il est tenu de mettre en liasse les lettres missives qu'il reçoit, et de copier sur un registre celles qu'il envoie.

9. Il est tenu de faire, tous les ans, sous seing privé un inventaire de ses

No decision has been found in the English reports that the broker's book is by the law merchant or by custom evidence between the parties. There are, no doubt, many dicta to that effect entitled to much respect, but no actual decision. The inconvenience of the doctrine is well pointed out in *Goom v. Aflalo* (a): it makes the terms of the contract "depend upon" a private act of which neither of the parties would be "informed."

In *Townend v. Drakeford* (b), in 1843, at Nisi Prius the bought and sold notes differed, and there was an unsigned entry in the broker's book. Lord Denman, C. J., nonsuited the plaintiff, and it is clear, from his reference to *Hawes v. Forster* (c), that he was still of opinion that the bought and sold notes were the contract, although he considered that if nothing but a signed entry in the book was in evidence the Court must adopt it.

The difficulty of deciding these points may be gathered from the considered judgments of Lord Campbell, C. J., and

effets, mobiliers et immobiliers, et de ses dettes actives et passives, et de le copier année par année sur un registre special à ce destiné.

10. Le livre journal et les livres des inventaires seront paraphés, et visés une fois par année.

Le livre de copies des lettres ne sera pas soumis à cette formalité.

Tous seront tenus par ordre de dates sans blancs lacunes, ne transports en marge.

11. Les livres dont la tenue est ordonnée par les art. 8 et 9, ci dessus, seront cotés, paraphés, et visés, soit par un des juges des tribunaux de commerce, soit par le maire, ou un adjoint, dans le forme ordinaire et sans frais. Les commerçans seront tenus de conserver ces livres pendant dix ans.

12. Les livres de commerce régulièrement tenus peuvent être admis par le juge pour faire preuve entre commerçants pour faits de commerce.

13. Les livres que les individus faisant le commerce sont obligés de tenir, et pour lesquels ils n'auront pas observé les formalités ci dessus prescrites, ne pourront être représentés, ni faire foi en justice au profit de ceux qui les auront tenus sans prejudice de ce qui sera réglé au livre de Faillitès et Banqueroutes. . . .

Titre V., art. 84. Les agents de change et courtiers sont tenus d'avoir un livre revêtu des formes prescrites par l'art. 11.

Ils sont tenus de consigner dans ce livre, jour par jour et par ordre de dates, sans ratures, interlignes, ni transpositions, et sans abréviations ni chiffres, toutes les conditions des ventes, achats, assurances, négociations, et en général de toutes les opérations faites par leur ministère.

(a) *Goom v. Aflalo*, 6 B. & C. 117.

(b) *Townend v. Drakeford*, 1 Car. & Kir. 20.

(c) *Hawes v. Forster*, 1 M. & R. 368.

Erle and Patteson, JJ., in *Sievwright v. Archibald* (a), in 1851. The simple facts of the case appear sufficiently from the judgment of Erle, J., which contains a most masterly statement of his views.

He said:—"In this case it appeared, by the evidence of "the broker at the trial, that he agreed with the defendant "to sell to him 500 tons of Dunlop's iron; that the Dunlop's "iron was Scotch, that he delivered to the defendant a "bought note, in which the thing bought was named Scotch "iron, and to the plaintiff a sold note, in which the thing "sold was named Dunlop's iron; and it further appeared "that the defendant had repeatedly admitted the existence "of some contract by requesting the plaintiff to release him "therefrom upon terms.

"The plaintiff had declared for not accepting Dunlop's iron; "but on the defendant producing the bought note, so that "it was in evidence, and objecting that there was no contract because the bought and sold notes varied, the plaintiff "then contended that the defendant had ratified the contract "expressed in the bought note sent to the defendant. The "declaration was then amended to agree with the bought "note; and the jury found their verdict for the plaintiff, "and that the defendant had ratified the contract alleged in "the amended declaration."

He continued, "I would observe that the question of the "effect either of an entry in a broker's book signed by him, "or of the acceptance of bought and sold notes which agree, "is not touched by the present case. I assume that sufficient "parol evidence of a contract in the terms of the bought "note delivered to the defendant has been tendered, and "that the point is, Whether such evidence is inadmissible "because a sold note was delivered to the plaintiff? in other "words, Whether bought and sold notes, without other "evidence of intention, are by presumption of law a contract "in writing. I think they are not. If bought and sold

(a) *Sievwright v. Archibald*, 20 L. J. Q. B. 529; 17 Q. B. 103. See also *Caerleon Tinplate Co. v. Hughes*, (1891) 60 L. J. 640, *per* Willes, J., at p. 641.

“notes which agree are delivered, and accepted without objection, such acceptance without objection is evidence for the jury of mutual assent to the terms of the notes: but the assent is to be inferred by the jury from their acceptance of the notes without objection, not from the signature to the writing, which would be the proof if they constituted the contract in writing.” He then went on to point out that the form of the instruments is strong to show that they are not intended to constitute a contract, and said (a): “It is clear also that, if, according to the opinion of the witnesses, there is a right to return the note if contrary to instructions, the keeping of the note makes it binding, and not the signature. The governing principle in respect of contracts is to give effect to the intention of the parties; and, where the intention to contract is clear, it seems contrary to that principle to defeat it because bought and sold notes have been delivered which disagree. They are then held to constitute the contract only for the purpose of annulling it.

“It seems to me therefore that, upon principle, the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree.” After reviewing most of the reported cases, he proceeded, “From this review I gather that, in the greater number of the cases, the doctrine, that bought and sold notes are the sole evidence of the contract, is not recognised, nor was the point decided that other evidence of the contract and of a compliance with the statute is inadmissible, if bought and sold notes have been delivered which disagree.” Erle, J., was of opinion that the other evidence in this case, viz., the evidence of ratification, was sufficient to show that the bought note expressed the contract between the parties. He was further of opinion that there was not any substantial variance between the notes.

That which Erle, J., actually decided was that the bought

and sold notes were not the only evidence of the contract. It does not seem too much, notwithstanding the early passage in the judgment relating to the broker's book which has been set out, to assume that he would have held that the note in the broker's book was not the only evidence admissible. If that be the true effect of the judgment, the extent to which the broker is the agent in common of both parties can be little more than to make a binding contract, subject to the approval of his principals ; a mere agent to register a proposed contract.

If a broker makes a contract which he was not authorized to make, and signs a memorandum and bought and sold notes of such a contract, the person who employed him may show that the broker was not his agent for the purpose of making that contract. If the broker acts within his authority, and makes a contract which he was authorized to make, and then proceeds to make a memorandum in his book, and signs bought and sold notes which agree, no question can arise. If, however, the book and the bought and sold notes differ, then if these documents are to be looked upon merely as evidence, but not the only evidence, of what the contract was, there seems to be no reason why evidence should not be given to show which of them truly sets out the contract.

If either party has accepted a note without making any objection to its terms, that would be strong evidence against him that that note truly set out the contract which he believed himself to have made, and if the other party at the trial relies on that note also it seems to be merely a question of evidence whether he has done so all along, or has shifted his ground for the purpose of the action. If it can be shown that he at first treated his own note as the correct one, then the parties were never *ad idem*, and there is no evidence that there ever was a contract.

The view which was taken by Patteson, J., in *Sieveuright v. Archibald* (a), was that the bought note was merely a statement or representation to the buyer of what the broker

(a) *Sieveuright v. Archibald*, 20 L. J. Q. B. 529 ; 17 Q. B. 103.

had done for that person, and was not a memorandum signed for the purpose of binding him.

He then went on to say that he could not doubt that if a broker makes a signed entry in his book, "notwithstanding" cases and dicta apparently to the contrary, such memorandum would be the binding contract on both parties," but that in this case there was no signed entry, and therefore if there was a memorandum at all it must be either both the notes or one of them: that neither by itself can be so regarded, and that on this point all that was decided in *Hawes v. Forster* (a) was that if one only was produced, the other would be assumed to be the same until it was shown not to be. Therefore, if there was a memorandum at all, it must be both notes, and as, in his opinion, they differed, there was no evidence of any contract.

This judgment seems open to this remark, that although a note at the time when it was sent to the buyer or seller was a mere statement to him by the broker of what he had done, yet if both parties subsequently assent to the terms of that note, there does not seem to be any reason why it should not be regarded as a memorandum of the contract.

Lord Campbell's view (b) was that there was no evidence of ratification of the bought note by the defendant; that the entry in the broker's book, if there is one, is the binding contract between the parties, and that a mistake in the bought or sold note would not affect its validity; that a long series of cases had established that where there was no entry in the broker's book, the bought and sold notes were the evidence of the contract, provided there was no substantial difference; but if there was that difference there was no evidence of any contract, and that in this case there was a substantial difference.

This judgment is in most respects of the same effect as that of Patteson, J., but it is very difficult to say to what extent it differs from that of Erle, J. The aim of the judgment

(a) *Hawes v. Forster*, 1 M. & R. 368.

(b) Which Wightman, J., had read and concurred in.

of Erle, J., was to point out that evidence of ratification of one note was admissible. Lord Campbell begins his judgment by stating that there was no evidence of ratification.

It was formerly a matter of doubt whether an action could be brought on one note only.

In *Henderson v. Barnewall* (a), in 1827, the Court of Exchequer evaded the question by what seems an odd decision on a question of fact. Rowland Roscoe was a broker in Liverpool; his brother William was his salesman and clerk. The clerk, William, did the actual broker's work in this sale, but the sold note on which the plaintiff relied was signed by the master, Rowland, and the Exchequer decided that the clerk was the broker, and his master a mere stranger. The general understanding of men is, that an order given to a trader's clerk is given to the master, and that work done by the clerk is done for the master. It is evident from the facts that both Rowland and William viewed the transaction in that light, but the Court of Exchequer did not.

In the case of *Crofts v. Parton* (b), in 1864, the defendant called on the brokers and asked them to purchase iron for him, leaving it to them to settle the price. At this time the brokers had already had instructions from the plaintiff to sell iron for him. The brokers sold the plaintiff's iron to the defendant, and sent notes to both parties.

The note sent to the defendant was the sold note, in these terms:—"Sold to S. Parton, Esq., on account of principals," &c., signed by the brokers.

This note, on being produced by the defendant, was put in evidence by the plaintiff, who did not produce the bought note, nor was it called for. No entry in the broker's book was put in. It was contended for the defence that the sold note only was in evidence, whereas both notes should have been put in. But the Court, consisting of Erle, C. J., Williams, Keating, and Willes, JJ., held that this was a sufficient memorandum.

(a) *Henderson v. Barnewall*, 1 Y. & J. 387.

(b) *Crofts v. Parton*, 33 L. J. C. P. 189; 16 C. B. N. S. 11.

The point is, however, much connected with another, on which there is some authority, namely, whether a principal has in general a right to refuse to receive, or be bound by, a contract delivered to him by a broker whom he has employed in the ordinary manner. If the principal has a right on receipt of the note to return it and repudiate the contract altogether, it is manifest that there is no absolute contract until he has either adopted the contract by retaining a note delivered to him, or waived his right to have an opportunity to return the note, and so repudiate the contract. The objection in such cases is not that there is no sufficient memorandum of the contract, but that there is no contract at all, for the authority of the broker in such cases is merely to negotiate a bargain and propose it to his principal, who is to be bound by it unless he dissents. Until, therefore, the proposal is expressly or tacitly accepted, the contract is not made.

Proof has in some cases been given of a usage in London, by which the principals have a right to return the broker's note within twenty-four hours, and so to refuse to be bound by the contract.

In *Heyman v. Neale* (a), in 1809, the defendant seems to have relied on this usage as a part of the law merchant, not requiring proof. In that case the broker seems to have had express authority to make the contract, and Lord Ellenborough is reported to have used terms that may have borne reference to the peculiar circumstance of the broker's express authority, but which certainly seem to have been expressed generally to the effect that no such custom was part of the law.

In *Hodgson v. Davies* (b), in 1810, there had been bought and sold notes delivered for the sale of tobacco, payment to be by bill. Five days afterwards the defendant, who was the seller, refused to proceed with the contract. The defence was, that the person who sells goods by a broker

(a) *Heyman v. Neale*, 2 Camp. 337, ante, p. 96.

(b) *Hodgson v. Davies*, 2 Camp. 531.

reserves to himself the power of ratifying or rejecting the contract, as he shall be satisfied with the credit of the purchaser. The special jury said, that unless the name of the buyer had been previously communicated to the seller if the payment is to be by bill, the seller is always understood to reserve to himself the power of disapproving of the sufficiency of the buyer and annulling the contract, but that he must exercise that power more promptly than the defendant in this case had done.

This finding of the jury, it is to be observed, is limited in terms to the case of a seller upon credit, and seems to give him a reasonable but uncertain time to exercise his option.

In *Humphries v. Carvalho* (a), in 1812, it is said that evidence was given that it was the custom of trade for either party to return the contract note if he disapproved of it within twenty-four hours. This custom, if it existed, would have had some bearing upon the merits of that cause, but as it was irrelevant to the point on which the case is reported, the accuracy of the reporter's statement cannot be depended upon.

In *Hawes v. Forster* (b), at the second trial, in 1834, evidence was given by some eminent merchants "that if the broker's bought or sold note, as the case might be, were not consonant with their directions to the broker they returned it." This seems to be nearly the same thing as the statement in *Humphries v. Carvalho* (a), and is open to the same remark. It had a bearing on the question then at issue, and is therefore of some weight; but as it was rather collateral to it, there is not any reason to look upon either the evidence or the report as minutely accurate.

In *Thompson v. Gardiner* (c), in 1876, a broker was employed by the plaintiff to sell for him. He delivered notes to both buyer and seller, but he signed the one given to the seller only. The defendant kept his note for two or three

(a) *Humphries v. Carvalho*, 16 East, 45.

(b) *Hawes v. Forster*, 1 M. & R. 368.

(c) *Thompson v. Gardiner*, 1 C. P. D. 777.

weeks and then repudiated the contract. Brett, J., delivering the judgment of the Court upholding the verdict for the plaintiff, said, "The authorities are conclusive to show that "the broker acting for one of the contracting parties, making "a contract for the other, is not authorized by both to bind "both. But the broker who makes a contract for one may "be authorized by that person to make and sign a memorandum of the contract. That has frequently been held. "The question here is whether there was any evidence that "the broker was so authorized." And Brett, J., was of opinion that there was ample evidence that the defendant had recognised the broker's authority to sign for him (a).

In all cases to which such a custom applies it is evident that the broker has no *prima facie* authority to make a contract, and when there is but one contract note delivered there must be something proved beyond the mere existence of the relation of broker and principal between the broker and the party who has not received and retained the note, or else there is no proof of a contract on his part. And when there is independent proof that the principal did in fact enter into a parol contract to the same effect as that contained in the note, it would seem to require extraneous proof to show that he authorized the broker to sign a contract for him without delivering a note to himself. And at all events he could not be taken to give the broker *prima facie* authority to sign anything but a memorandum of the contract actually made, and consequently it would be open to him to show that the note was not a memorandum of the true contract. In the case of *Pitts v. Beckett* (b), in the sittings after Trinity Term, 1845, the Exchequer is said to have decided on these principles, but giving them rather a more extensive application. That was an action for not accepting goods. The parties had been brought together by a Liverpool broker and had made a bargain personally. The broker

(a) See also *Moore v. Campbell*, 26 L. J. Ex. 310; 10 Ex. 323.

(b) *Pitts v. Beckett*, 14 L. J. Ex. 358; 13 M. & W. 743. See also *Sievwright v. Archibald*, 20 L. J. Q. B. 529; 17 Q. B. 103; *Heyworth v. Knight*, 33 L. J. C. P. 298; 17 C. B. N. S. 298.

afterwards rendered the plaintiff a sold note signed by the broker, describing the sale as unqualified. He did not render any bought note. The defence was, that the real contract was one with a warranty which was not complied with, and the jury found that such was the fact. The case took a double shape. Was there evidence to satisfy the Statute of Frauds, there being only one note, and was that note a written contract, so as to preclude the parties from giving evidence of terms not contained in it? Cresswell, J., at *Nisi Prius*, at Liverpool, directed the jury to find for the defendant, but reserved both points, and the plaintiff obtained a rule nisi to enter a verdict for him, which was afterwards discharged (a).

It had previously been decided at *Nisi Prius*, once by Lord Kenyon (b), in 1794, and once by Parke, J. (c), in 1830, that a broker employed to purchase at an auction had no apparent authority from his principal to do anything more than purchase the particular article mentioned by his principal on the terms brought to the principal's notice. The decision in *Pitts v. Beckett* (d) seems to extend the principle of these cases. But it cannot extend to cases where the broker is entrusted with any token of authority to make a contract: as for instance, when he is entrusted with the custody of the goods or delivery orders: or perhaps, where he is permitted to have the samples, though that must depend on the light in which merchants view the possession of the samples.

In the case of *Heyworth v. Knight* (e), in 1864, which was an action for not accepting a cargo, the defendant had by letter authorized his brokers to buy for him on certain terms:

(a) Lord Blackburn, in the original edition of this work, adds: "I was not present at the argument in banc, but I am informed that the Court said that a broker had in no case *prima facie* authority to do more than to negotiate the contract and write down the terms of the contract actually made; and that, consequently, at all events this note signed by him was not within his authority."

(b) *The East India Co. v. Hensley*, 1 Esp. 112.

(c) *Horsfall v. Fauntleroy*, 10 B. & C. 755.

(d) *Pitts v. Beckett*, 14 L. J. Ex. 358; 13 M. & W. 743.

(e) *Heyworth v. Knight*, 33 L. J. C. P. 298; 17 C. B. N. S. 298.

his brokers then wrote to the plaintiff's brokers making an offer in terms which differed from their authority, but which the Court considered to be in substance the same. This offer was accepted. The bought and sold notes which were then drawn up did unquestionably differ from the accepted offer. The declaration was founded on the terms of the authority and not on the notes. The Court upheld the verdict for the plaintiff, being of opinion that it was competent to him to bring an action on the contract disclosed by the letters. Erle, C. J., said: "Something was said by Mr. Mellish about "the letters not constituting a binding contract between the "parties, because a more regular and extended contract was "contemplated (a). That notion, however, is totally at "variance with the law as laid down by many cases in the "Court of Queen's Bench, where the broker's book has been "allowed to be resorted to for evidence of the contract, "though the parties INTENDED to contract by means of bought "and sold notes, where there has been a variance between "these documents" (b). Perhaps it may be suggested that in the above important passage the expression "intended to contract" may be read as "intended to evidence the contract."

It would seem from these very conflicting authorities that it is still a matter in doubt whether any document can be said to be *the* memorandum of the contract. Mr. Benjamin (in the second edition of his work) deduced (c) certain propositions from them, the first one being that the signed entry in the book *constituted* the contract, the second one that the notes did *not constitute* the contract, the third and fourth ones being that both or either note might satisfy the statute. But in the last (fifth) edition, published in 1906, it is pointed out that when the cases above referred to were decided, a broker was bound by law to enter the terms of the contract in his book, and that fact was regarded by the Courts as very

(a) See *Lewis v. Brass*, 3 Q. B. D. 667.

(b) Willes, J., in this case dissented from the opinion of the majority of the Judges in *Cowie v. Remfry*, 5 Moo. P. C. C. 232.

(c) Benjamin on Sale, 2nd ed. p. 221.

material in leading to the conclusion that the parties intended the entry to be conclusive between them; and it is suggested that as the obligation to make the entry in the book no longer exists, the question is one to be solved by ordinary legal principles, such question being whether the document was intended to be the contract in writing, or if the contract was verbal, whether it is a memorandum (a).

Erle, J., in his very learned and powerful judgment delivered in *Sievwright v. Archibald* (b), drew attention "to the distinction between evidence of a contract, and evidence of a compliance with the Statute of Frauds. The question of compliance with the statute does not arise until the contract is in proof. In case of a written contract the statute has no application. In case of other contracts (i.e., unwritten ones), the compliance may be proved by part payment, or part delivery, or memorandum in writing of the bargain. Where a memorandum in writing is to be proved as a compliance with the statute, it differs from a contract in writing, in that it may be made at any time after the contract, if before the action commenced; and any number of memoranda may be made, all being equally originals."

This very significant passage if it does not suggest seems, to say the least of it, to be consistent with the view that where there are several memoranda in existence differing from each other and all purporting to be memoranda of the contract, it is a matter of evidence which of them, if any, is a memorandum of the contract which the parties intended to enter into.

Parol Variations of Written Contracts.

When a contract, which must be in writing under the Sale of Goods Act, has been entered into in writing, it occasionally happens that the parties verbally agree to some alteration in it, or in the mode of carrying it out.

If any disagreement should arise in carrying out the altered

(a) Benjamin on Sale, 5th ed. p. 287.

(b) *Sievwright v. Archibald*, 20 L. J. Q. B. 529; 17 Q. B. 107.

contract, neither party can bring an action on the verbally altered contract, where the alteration should have been evidenced by writing to be valid. As Lindley, J., said in *Hickman v. Haynes* (a), in 1875, "Neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds."

It becomes a question then whether either party can bring his action on the original contract.

Where the original contract has been rescinded neither party can avail himself of it, and in these cases of parol variations the defendant's argument has frequently been that the original contract must be taken to have been rescinded by the parties when they entered or thought they were entering into a substituted contract.

Where another contract can be proved to have been substituted for the original, as where both were in writing, it is probably a matter of law that the parties intended to rescind the original, but where no substituted agreement by which the parties bound themselves can be proved, it is a question of fact whether the parties did intend to rescind it when they entered into, or rather intended to bind themselves by, a substituted contract.

There does not seem to be any doubt that a contract which must be in writing may be rescinded verbally (b). If the original contract has not been rescinded either party may bring his action on it provided he can show his readiness and willingness to perform it.

In the case of *Vezey v. Rashleigh* (c), in 1904, it was held by Byrne, J., on the authority of *Price v. Dyer* (d) and *Robinson v. Page* (e), that although to prove rescission of a contract in writing and required by law to be in writing,

(a) *Hickman v. Haynes*, 44 L. J. C. P. 358; L. R. 10 C. P. 598.

(b) *Goss v. Lord Nugent*, 5 B. & Ad. 65.

(c) *Vezey v. Rashleigh*, 73 L. J. Ch. 422; (1904) 1 Ch. 634.

(d) *Price v. Dyer*, in 1810, 17 Ves. 363.

(e) *Robinson v. Page*, in 1826, 3 Russ. 114, 121.

parol evidence of a subsequent agreement was admissible, that meant evidence of an agreement for rescission only, and parol evidence of an agreement to *vary* the terms of the contract was inadmissible.

In several of the following cases there was a request by one party to postpone delivery, and it was urged in argument that the agreement to postpone amounted to a substituted contract the same as the original in all respects except as to the time of delivery; but this is not necessarily nor usually the case. Such an agreement generally amounts to nothing more than a licence by one party to the other to depart in that particular respect from the terms of the agreement, and is not a contract at all.

In *Cuff v. Penn* (a), in 1813, the defendant agreed to buy bacon of the plaintiffs, to be delivered in certain quantities on certain days. After some of the deliveries had been made the defendant represented to the plaintiffs that the sale of bacon was dull and requested them not to press it on him, and they assured him they would not, and consequently they postponed the deliveries. Eventually the defendant refused to accept any. And when the plaintiffs brought their action for not accepting it was argued for the defendant that the plaintiffs were suing on a contract which was a parol variation of a written contract, or was a parol contract substituted for a written one, in which case it would be void under the statute, for there had been neither a part acceptance nor a part payment. But Lord Ellenborough, C. J., overruled both objections, and the Court upheld the verdict for the plaintiffs.

In *Stead v. Dawber* (b), in 1839, the plaintiff agreed in writing to buy of the defendants a sloop-load of bones to be delivered on the 20th to the 22nd. Some days afterwards the plaintiff's broker pointed out that the 22nd was a Sunday, and asked the defendants if they would deliver all the bones on the 21st. The defendants said, "You had better say the '23rd or 24th.'" The price of bones having risen, they were

(a) *Cuff v. Penn*, 1 M. & S. 21.

(b) *Stead v. Dawber*, 10 A. & E. 57.

not sent. Lord Denman, C. J., delivering the judgment of the Court, said that the question was mainly one of fact, viz., did the parties intend to substitute a new contract for the old one, the same in all respects except those of the day of delivery and payment. The Court being of opinion that they did, ordered a verdict to be entered for the defendants.

This case was considered to have overruled *Cuff v. Penn* (a), but is itself very doubtful law.

In *Marshall v. Lynn* (b), in 1840, the defendant contracted in writing to buy of the plaintiff a quantity of potatoes to be shipped on board the plaintiff's brig, *The Kitty*, on her arrival at Wisbech the next time. On her arrival there, the defendant's son requested that she might first go to Lynn and from there take a cargo to London and then return to Wisbech. The plaintiff sent her accordingly. When she had returned to Wisbech and the plaintiff offered to load her, the defendant refused to take the potatoes. The plaintiff was non-suited on the ground that this was a parol variation of a written contract and was not binding.

It appears to have been considered in some of the preceding cases that the parol variation to raise a presumption of rescission must have been an essential part of the contract. Parke, B., said that this was unnecessary, for that "every part of the contract in regard to which the parties are stipulating, must be taken to be material."

Baron Parke approved of *Stead v. Dawber* (c), but it seems pretty clear that *Stead v. Dawber* (c) was wrongly decided, and is distinguishable from *Marshall v. Lynn* (b).

Goss v. Lord Nugent (d), in 1840, established, in the case of a contract relating to an interest in land, that if the original contract be varied and a new contract as to any of its terms substituted in the place of it, the new contract cannot be enforced unless it be also in writing.

(a) *Cuff v. Penn*, 1 M. & S. 21.

(b) *Marshall v. Lynn*, 9 L. J. Ex. 117; 6 M. & W. 109.

(c) *Stead v. Dawber*, 10 A. & E. 57.

(d) *Goss v. Lord Nugent*, 5 B. & Ad. 65.

In *Moore v. Campbell* (a), in 1854, the contract note on which the action was brought for not delivering, stated that the delivery of the hemp was to be from the quay. When the defendant informed Wilks, the plaintiff's agent, that the hemp had been put on the quay, Wilks requested that it might be warehoused on the plaintiff's account, which was done. Wilks then told the defendant to draw on the plaintiff for the hemp as soon as he was in a position to transfer it. Owing to a difference about the quantities, Wilks refused to give the defendant the plaintiff's acceptances. It was argued for the defendant, who had resold the hemp, that a verbal contract to deliver from the warehouse had been substituted for the written contract to deliver from the quay, and that the written contract was therefore rescinded. Parke, B., said, "We do not think that this plea was proved "by this evidence. If a new *valid* agreement substituted "for the old one before breach would have supported the "plea, we need not inquire, for the agreement was void."

In *Noble v. Ward* (b), in 1866, the defendants on the 12th of August contracted to purchase goods from the plaintiff to be delivered within stated times. On the 18th they entered into another contract in writing for the purchase of goods to be delivered and paid for within stated times. On the 27th the parties verbally agreed that the contract of the 12th should be cancelled and the time for delivery and payment under the contract of the 18th should be extended. The defendants eventually refused to take the goods. And it was argued for them that the contract of the 18th was rescinded by the substitution of that of the 27th, which was admitted to be invalid. At the trial the plaintiff was nonsuited on this ground. On the motion for a new trial, which was granted, Bramwell, B., delivering a judgment which was concurred in by the other Judges, was of opinion that the contract of the 18th was not in fact rescinded. The Exchequer Chamber affirmed this judgment—Willes, J.,

(a) *Moore v. Campbell*, 26 L. J. Ex. 310; 10 Ex. 323.

(b) *Noble v. Ward*, 35 L. J. Ex. 81; 36 L. J. Ex. 91; L. R. 1 Ex. 117; L. R. 2 Ex. 135.

saying that at least it was a question for the jury whether the parties did intend to rescind it. It had been argued for the defendants that a parol contract varying the terms of a written one, which would have operated as a rescission of the written one had it been in writing and therefore valid, would so operate although invalid, not being in writing. But the Courts were of the contrary opinion.

There is nothing in the 4th section of the Sale of Goods Act (nor was there anything in the 17th section of the Statute of Frauds) to show that a written contract within that section may not be rescinded by express verbal agreement. And where the Court can take notice of the fact that a valid contract has been substituted that may raise a presumption in law that the parties intended the earlier contract to be rescinded, but where no valid agreement to substitute a contract can be proved, the ground for such a presumption is gone.

In *Ogle v. Earl Vane* (a), in 1867, it was contended that the plaintiff was in fact suing for the breach of a verbal agreement to deliver at a date later than that fixed by the original agreement. The defendant had contracted to deliver iron to the plaintiff not later than July. In consequence of an accident to his furnaces the defendant was unable to deliver by that time, and a correspondence took place in which the plaintiff pressed for delivery. Eventually the plaintiff bought in against the defendant at an advanced price in the following February. Blackburn, J., said that the effect of the negotiations was, not that the plaintiff had substituted any new contract for the old one, but in order to suit the defendant's convenience he said, "I'll wait, 'but I do not bind myself to wait.' This distinction 'between waiting and not binding one's self to wait, is 'the same as that between a mere licence and a contract; or 'as that between giving time to principal by mere forbearance, and binding one's self for a good consideration to 'give time, in which latter case only is the surety released.

(a) *Ogle v. Earl Vane*, 36 L. J. Q. B. 175; 37 L. J. Q. B. 77; L. R. 2 Q. B. 275; L. R. 3 Q. B. 272.

“The question in such cases being, ‘Have you ever bound “‘yourself?’” And the Court held that the plaintiff was entitled to recover; and was affirmed in the Exchequer Chamber (a).

In *The Leather Cloth Co. v. Hieronimus* (b), in 1875, the defendant verbally contracted to buy goods from the plaintiffs, to be sent from London *viâ* Ostend by Messrs. Gaudet Frères. When the goods were ready for delivery Gaudet Frères had ceased to carry *viâ* Ostend, and the plaintiffs sent the goods *viâ* Rotterdam and an invoice to the defendant. The goods were lost at sea. In answer to a request for payment, the defendant wrote in such a manner that the Court held there was a sufficient memorandum of the contract to send *viâ* Ostend, and there was ample evidence that the defendant had ratified or assented to the change of route. It appears to have been argued for the defendant that there was a substituted contract, viz., to send *viâ* Rotterdam, and that there should have been evidence of it in writing to enable the plaintiffs to succeed. Cockburn, C. J., Blackburn, Mellor, and Archibald, JJ., held not. Blackburn, J., said: “I “cannot see why the assent to a substituted mode of performing one of the terms of a contract need be in writing “and may not be by parol, though the original contract “must have been in writing. They are quite different “things; the proof of a substituted contract, and the proof “of a ratification or approval, after performance, of the “substituted mode of performance.”

In *Hickman v. Haynes* (c), in 1875, the plaintiff in writing contracted to deliver to the defendants 100 tons of iron in equal instalments in March, April, May, and June. The three first instalments were delivered and paid for. In June the defendant verbally requested that the June delivery might be postponed, and in August a correspondence relating to a further

(a) See also *Tyers v. Rosedale and Ferryhill Iron Co.*, in 1873, 42 L. J. Ex. 185; 44 L. J. Ex. 130; L. R. 8 Ex. 305; L. R. 10 Ex. 195.

(b) *The Leather Cloth Co. v. Hieronimus*, 44 L. J. Q. B. 54; L. R. 10 Q. B. 140.

(c) *Hickman v. Haynes*, 44 L. J. C. P. 358; L. R. 10 C. P. 598.

postponement took place. The defendants eventually refused to take the iron. It was argued for them that the verbal agreement to postpone the June delivery was a good excuse in law for not accepting *in* June according to the original contract, and further, that as it was not in writing, it was not a good contract to accept *after* June. The Court, however, was of opinion that this was not the substitution of one agreement for another, but merely a forbearance to deliver at the defendant's request.

In *Plevins v. Downing* (a), in 1876, the defendant in June bought of the plaintiffs 100 tons of iron, "delivery, 25 tons "at once, and 75 tons in July next." By the end of July 75 tons had been delivered; there was no evidence of a request by the defendants to have delivery of the remaining 25 tons postponed till after July. In October the defendants verbally requested that they should be sent, but subsequently declined to accept them. The Court upheld the verdict for the defendant, on the grounds set forth by Brett, J., who delivered the judgment of the Court. He said:—

"It seems to us, however, that the verdict was rightly "directed to be entered for the defendant. It is true that a "distinction has been pointed out and recognized between an "alteration of the original contract in such cases and an "arrangement as to the mode of performing it. If the "parties have attempted to do the first by words only, the "Court cannot give effect, in favour of either, to such "attempt: if the parties make an arrangement as to the "second, though such arrangement be only made by words, "it can be enforced. The question is, what is the test in "such an action as the present, whether the case is within "the one rule or the other.

"Where the vendor, being ready to deliver within the "agreed time, is shown to have withheld his offer to deliver "till after the agreed time in consequence of a request to "him to do so made by the vendee before the expiration of "the agreed time, and where after the expiration of the

(a) *Plevins v. Downing*, 45 L. J. C. P. 695; 1 C. P. D. 220.

“agreed time and within a reasonable time the vendor pro-
 “poses to deliver, and the vendee refuses to accept, the
 “vendor can recover damages. He can properly aver and
 “prove that he was ready and willing to deliver according to
 “the terms of the original contract. He shows that he was
 “so, but that he did not offer to deliver within the agreed
 “time, because he was within such time requested by the
 “vendee not to do so. In such case it is said that the
 “original contract is unaltered, and that the arrangement
 “has reference only to the mode of performing it. But if
 “the alteration of the period of delivery were made at the
 “request of the vendor, though such request were made
 “during the agreed period for delivery, so that the vendor
 “would be obliged, if he sued for a non-acceptance of an
 “offer to deliver made after the agreed period, to rely upon
 “the assent of the vendee to his request, he could not aver
 “and prove that he was ready and willing to deliver accord-
 “ing to the terms of the original contract. The statement
 “shows that he was not. He would be driven to rely on
 “the assent of the vendee to a substituted time of delivery,
 “that is to say, to an altered time or a new contract. This
 “he cannot do so as to enforce his claim. This seems to be
 “the result of the cases which are summed up in *Hickman v.*
 “*Haynes*” (a).

(a) L. R. 10 C. P. 598.

The Canadian cases relating to parol evidence to explain the written memorandum will be found in the notes to Chapter 4 of this part, beginning at page 81. The brokers' notes are memorandums of the sales, and all that has been said on the previous pages applies to this particular species of memorandum. There are very few Canadian cases relating to the subject of brokers' notes.

Parol variations. The subject of parol variations must not be confused with that of parol evidence to explain, add to or supplement the memorandum, or to destroy its effect as a memorandum under the Statute of Frauds. This topic has been dealt with in the notes to Chapter 4 of this part, ante p. 81a and following pages.

PART II.

SALE AND AGREEMENT TO SELL.

CHAPTER I.

GENERAL RULES TO ASCERTAIN WHETHER AN AGREEMENT AMOUNTS TO A SALE OR NOT.

THE next question to be considered is, what are the circumstances under which a contract (good within the Act) amounts to a sale (*a*) of goods, so as to operate as an actual sale of them, and when not?

This is, properly speaking, a question depending upon the construction of the agreement, for the law professes to carry into effect the intention of the parties as appearing from the agreement, and to transfer the property when such is the intention of the agreement, and not before. In this as in other cases, the parties are apt to express their intention obscurely, very often because the circumstances rendering the point of importance were not present to their minds, so that they really had no intention to express. The consequence is, that without absolutely losing sight of the fundamental point to be ascertained, the Courts and legislature have adopted certain rules of construction which in their nature are more or less technical; some of them seem very well fitted to aid the Court in discovering the intention of the parties: the substantial sense of others may be

(*a*) It should be borne in mind that with the advent of the Sale of Goods Act, 1893, the old expression "bargain and sale," formerly used to denote a completed sale accompanied by the transfer of the property in the goods, disappeared, being replaced by the term "sale."

questioned (a). The Sale of Goods Act, 1893, by section 1 provides as follows:—

(1) A contract of sale of goods (b) is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price. There may be a contract of sale between one part owner and another. (2) A contract of sale may be absolute or conditional. (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an "agreement to sell." (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred (b).

The parties do not contemplate a sale till the specific goods on which that contract is to attach are agreed upon. But when the goods are ascertained, the parties are taken to contemplate an immediate sale of the goods, unless there be something to indicate an intention to postpone the transference of the property till the fulfilment of any conditions; and when by the agreement the seller is to do anything to the goods for the purpose of putting them into a deliverable state, or when anything is to be done to them to ascertain the price, it is presumed that the parties mean to make the performance of those things a condition precedent to the transference of the property. But as these are only rules for construing the agreement, they must yield to anything in the agreement that clearly shows a contrary intention, for the parties may lawfully agree to an immediate transference of the property in goods, although the seller is to do many things to them before they are to be deliverable: and, on the other hand, they may agree to postpone the vesting of the property till after the fulfilment of any conditions they please.

A contract of sale, under section 1 (1) of the Act, includes an agreement to sell, and an actual sale.

(a) *Post*, p. 185.

(b) See also s. 5 (1) as to "future goods."

Such a contract may have different effects in law upon the ownership of the goods to which it relates. It may be an agreement perfectly binding on the parties so as to give either of them a remedy against the *person* and general estate of the other for any default in fulfilling his part of the agreement, but having no effect on the property or right of possession in the goods, and giving the proposed buyer neither the rights nor liabilities of the proprietor ; so that he has no preferable right to the goods themselves, nor any means of enforcing his demand against them other than those of any other creditor, while on the other hand he is not liable to any loss arising from the destruction or injury of the goods.

A contract of this nature is generally called an "executory agreement" or an "agreement to sell," and, as indicated above, only confers upon the proposed purchaser a right *in personam*, and no right *in rem* attaches to the goods.

On the other hand it may be an agreement amounting to a "sale," or what was formerly known as a "bargain and sale" (a), which transfers to the buyer the general property in the goods, and with it the rights and liabilities attached to the property. The buyer in this case has a right *in rem*, a specific interest in the goods themselves, of which he may avail himself, independently of his remedy against the seller on the contract, and on the other hand making him liable to the general risk of any loss befalling the goods. This transaction is sometimes called an "executed sale," and the seller, if unpaid, still retains certain rights over the goods until they are delivered (see *post*, page 339).

These rules require a careful examination of the cases in which they have been applied, in order to perceive their precise meaning and force (b).

(a) The old term "bargain and sale" was an expression of very definite meaning in use in the old forms of pleading: it stood for what is sometimes called an "executed contract," that is, one where the property has passed. An executory contract is one where the property has not passed. Neither "executed" nor "executory" refers to something done or to be done according to the contract other than as above.

(b) They are nearly, but not quite, equivalent to the text of the Digest: *Si id quod venierit appareat quid quale quantum sit et pretium et pure venit perfecta*

The goods must be specified.

Specific goods are defined by the Act, section 62, as "goods identified and agreed upon at the time a contract of sale is made."

The rule that the parties must be agreed as to the specific goods on which the contract is to attach before there can be a sale, is one that is founded on the very nature of things. Till the parties are agreed on the specific individual goods (a), the contract can be no more than a contract to supply goods answering a particular description, and since the seller would fulfil his part of the contract by furnishing any parcel of goods answering that description, and the buyer could not object to them if they did answer the description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, till it is ascertained which are the very goods sold. Section 16 of the Sale of Goods Act provides that "Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained."

This rule has existed at all times; it is to be found in the earliest English law books. In the Year Book (b) the Justices all agreed that a grant to kill and take a deer in the grantor's park conferred no property in any deer; but Brian (then Chief Justice) said: "But if I have a black deer amongst others in my park, I can grant him, and the grant is good; and if I have two amongst the others known, and I grant one or both of them, the grant is good, for this, that it is ascertained what things is granted."

Lord Coke (c) uses a very similar illustration: "If I have three horses, and I give you one of them, in this case the

est emptio. "When the thing to be transferred under the contract of sale has been ascertained in its individuality, its state, and its quantity, and the price is fixed and the transference is to be unconditional, the contract amounts to a perfect sale"; but as this concise statement requires a good deal of explanation, the reader is referred to the extracts from Pothier, *post*.

(a) The individuality of the thing to be delivered, as Lord Ellenborough put it, in *Busk v. Davis*, 2 M. & S. 403.

(b) 18 Edw. 4, 4, 14.

(c) *Heyward's Case*, 2 Coke, 36.

“election ought to be made in the lifetime of the parties, for
“inasmuch as none of the horses is given in certain, the
“certainty, and thereby the property, begins by election.”

It makes no difference, although the goods are so far ascertained, that the parties have agreed that they shall be taken from some specified larger stock. In such a case the reason still applies: the parties did not intend to transfer the property in one portion of the stock more than in another, and the law which only gives effect to their intention, does not transfer the property in any individual portion.

Thus in *White v. Wilks* (a), in 1813, where the agreement was for the sale of 20 tons of oil in the seller's cisterns, and in point of fact the seller had many cisterns with much more than 20 tons in them, Sir J. Mansfield, C. J., held, at *Nisi Prius*, that no property had passed to the buyer, because the contract did not attach on any particular portion of oil, and the Court of Common Pleas approved of this decision. And in *Busk v. Davis* (b), in 1814, in which case the agreement was for the sale of “ten tons of Riga flax, marked P. D. R., at Davis's wharf, ex *Vrouw Maria*,” and the sellers had more than 10 tons of flax of this description lying at Davis's wharf, in mats varying in size; and nothing was done to sever 10 tons from the rest; the King's Bench decided that no property passed. Lord Ellenborough said: “The flax
“was to be weighed, and the portion of the entire bulk to be
“delivered was to be ascertained, and if the weight of any
“number of unbroken mats was insufficient to satisfy the
“quantity agreed upon, it would have been necessary
“to break open some mats in order to make up that
“quantity. Therefore it was impossible for the purchaser to
“say that any precise number of mats belonged exclusively
“to him. If the weight did not divide itself in an integral
“manner, it would be necessary to break up and take some
“fraction of another mat: every component part, therefore,
“was uncertain;” and Le Blanc, J., remarked, that every thing required to make a complete sale had been done but

(a) *White v. Wilks*, 5 Taunt. 176.

(b) *Busk v. Davis*, 2 M. & S. 397.

one. "It was to be ascertained what goods the vendee was to have; now that is the point where the case is defective . . . something was to be done to ascertain the individuality."

Several similar decisions were come to about the same time: *Wallace v. Breeds* (a), *Austen v. Craven* (b), *Shepley v. Davies* (c), and *Boswell v. Kilborn*, in 1862 (d).

The case, however, of *Whitehouse v. Frost* (e), decided by the Court of King's Bench in 1810, does not seem very consistent with the others and is usually referred to with disapproval.

In that case J. and L. Frost had entered into a contract to sell oil to Townsend, proved by this note, delivered by them to Townsend:—"Mr. J. Townsend, bought of J. and L. Frost, ten tons of Greenland oil in Mr. Staniforth's cisterns, at your risk, at 39*l.*—390*l.*" At the time of the agreement, there were in this cistern forty tons of oil, the whole of which had formerly belonged to Dutton and Bancroft. Dutton and Bancroft had sold ten tons of this oil to J. and L. Frost, and J. and L. Frost gave Townsend a delivery order on Dutton and Bancroft for "the ten tons of oil we bought of you." Nothing whatever was done to sever the ten tons from the rest of the forty. The King's Bench decided that as between Frost and Townsend the property had passed.

The Court of Common Pleas in *White v. Wilks* (f), and *Austen v. Craven* (b), expressed themselves much dissatisfied with this decision, which they considered inconsistent with and overruled by the other decisions; but Le Blanc, J., one of the Judges who decided *Whitehouse v. Frost* (e), subsequently, in *Busk v. Davis* (g), explained the case on a principle quite consistent with the other cases, though it may be doubted whether the facts of the case of *Whitehouse v. Frost* as reported quite justify the distinction. "In *Whitehouse v. Frost*," said he, "the owner of a large quantity

(a) *Wallace v. Breeds*, in 1811, 13 East, 522.

(b) *Austen v. Craven*, in 1812, 4 Taunt. 644.

(c) *Shepley v. Davies*, in 1814, 5 Taunt. 617.

(d) *Boswell v. Kilborn*, 15 Moo. P. O. C. 309.

(e) *Whitehouse v. Frost*, 12 East, 614.

(f) *White v. Wilks*, in 1813, 5 Taunt. 176.

(g) *Busk v. Davis*, in 1814, 2 M. & S. 397.

“ of oil in the mass sold a certain quantity of it to B., who
“ contracted to sell the same to C., *specifically as an undivided*
“ *quantity*, and gave him an order upon the owner for the
“ delivery, which order the owner accepted. The question
“ that arose was not between the owner and B., but between
“ C. and B., who as far as it was in his power had done
“ every act to complete the delivery, for he only *pretended to*
“ *sell an undivided quantity*. Therefore, whatever might
“ have been the case as between the owner and B., the Court
“ were of opinion that, as between the subvendee and B., the
“ sale was complete.” In the reported case no mention is
made of there being any proof whatever of the agreement
being to sell, not ten tons out of forty, but an undivided
fourth part of every portion of the forty tons ; unless the
phrase “ at your risk ” bears that meaning. J. and L. Frost
seem to have professed to sell and deliver ten tons of oil
belonging to them in Staniforth’s cistern ; and their defence
to the action was, that they had no such oil, because it still
remained the property of Dutton and Bancroft. It may be
doubted whether they were not estopped from setting up
such a defence against their own agreement, but the decision
does not seem to have been given on that ground.

Section 17 of the Sale of Goods Act provides :—“(1) Where
“ there is a contract for the sale of specific or ascertained
“ goods the property in them is transferred to the buyer
“ at such time as the parties to the contract intend it to
“ be transferred. (2) For the purpose of ascertaining the
“ intention of the parties regard shall be had to the terms of
“ the contract, the conduct of the parties, and the circum-
“ stances of the case.”

In *Seath v. Moore* (a), in 1886, Lord Blackburn said : “ It
“ is essential that the article should be specific and ascertained
“ in a manner binding on both parties, for unless that be so it
“ cannot be construed as a contract to pass the property in
“ that article.”

(a) *Seath v. Moore*, 55 L. J. P. C. 54, at p. 58 ; see also *Reid v. Macbeth*,
[1904] A. C. 223 ; *Sir James Laing and Sons v. Barclay, Curle & Co., Ltd.*,
[1908] A. C. 35 ; and cf. *McEntire v. Crossley*, [1895] A. C. at p. 463.

Subsequent appropriation.

The property will not pass until the goods have been specified, but the goods may be appropriated (a) or identified or specified as the goods on which the contract is to operate, subsequently to the making of the contract, either by the assent of both parties or by the seller's determination of an election. And when they have been made specific, the presumption being that the property was intended to pass, the property will pass, unless there is something to show that it was the intention of the parties that it should not pass. Some of the cases following are authorities for both the propositions. The statutory rules as to subsequent appropriation are contained in section 18 of the Sale of Goods Act as follows:—

“Rule 5.—(1) Where there is a contract for the sale of “unascertained or future goods by description, and goods of “that description and in a deliverable state are unconditionally “appropriated to the contract, either by the seller with the “assent of the buyer, or by the buyer with the assent of the “seller, the property in the goods thereupon passes to the “buyer. Such assent may be express or implied, and may be “given either before or after the appropriation is made.”

“(2) Where, in pursuance of the contract, the seller delivers “the goods to the buyer or to a carrier or other bailee [or “custodian] (whether named by the buyer or not), for the “purpose of transmission to the buyer, and does not reserve “the right of disposal, he is deemed to have unconditionally “appropriated the goods to the contract.”

It has been already said that the specific goods must be

(a) The word “appropriated” bears different meanings. It may mean that the goods have been fixed upon as the subject about which the parties are contracting, and in that case the contract can never apply to any other goods, as in *Laidler v. Burlinson*, 2 M. & W. 602, *post*, p. 196; or it may less correctly mean that the seller had merely intended to fix upon those goods as the subject of the contract, but had not finally elected to do so, as in *Atkinson v. Bell*, *post*, p. 139, 8 B. & C. 277, in which case he may alter his intention, and fix upon other goods; see *Anderson v. Morice*, 44 L. J. C. P. 10 and 341; L. R. 10 C. P. 58 and 609; 46 L. J. C. P. 11; 1 App. Ca. 619; and *Calcutta Co. v. De Mattos*, *post*, p. 256; 32 L. J. Q. B. 322; 33 L. J. Q. B. 214.

agreed upon; that is, both parties must be pledged, the one to give and the other to accept, those specific goods. This is obviously just, for until both parties are so agreed, the appropriation cannot be binding upon either; not upon the one, because he has not consented, nor upon the other, because the first is free. But the application of this principle leads to nice and subtle distinctions, which perhaps cannot be helped, but are not the less to be lamented. When the goods are selected from the first in the original agreement there is of course no difficulty on the point; both parties are then bound to apply the contract to those specific goods. Neither is there any difficulty where both parties have subsequently assented to the appropriation of some specific goods to fulfil an agreement that in itself does not ascertain which the goods are to be. The effect is then the same as if the parties had from the first agreed upon a sale of those specific goods. In the accurate language of Holroyd, J. (a), "the selection of the goods by the one party and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes."

But the difficulty arises when the original agreement does not ascertain the specific goods, and one party has appropriated some particular goods to the agreement, but the other party has not subsequently assented to such an appropriation. Such an appropriation is revocable by the party who made it and not binding on the other party, unless it was made in pursuance of an authority to make the election conferred by agreement; or unless the act is subsequently and before its revocation adopted by the other party. In either case it becomes final and irrevocably binding on both parties.

The question of whether there has been a subsequent assent or not, is one of fact; the other question of whether the selection by one party merely showed an intention in that party to appropriate those goods to the contract, or showed a determination of a right of election, is one of law, and sometimes of some nicety.

(a) *Rhode v. Thwaites*, 6 B. & C. 388.

The general rule laid down by Lord Coke in *Heyward's Case* (a), and adopted in *Comyn's Digest, Election*, seems to be, that when from the nature of an agreement an election is to be made, the party who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may perform his part of the agreement; when once he has performed the act the choice has been made and the election irrevocably determined; till then he may change his mind as to what the choice shall be, for the agreement gives him till that time to make his choice.

It follows from this, that where from the terms of an executory agreement to sell unspecified goods, the seller is to dispatch the goods, or to do anything to them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be; and the property is transferred the moment the dispatch or other act has commenced, for then an appropriation is made, finally and conclusively, by the authority conferred in the agreement, and in Lord Coke's language, "the certainty, and thereby the property, begins "by election" (a); but however clearly the seller may have expressed an intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with those particular goods, yet until the act has actually commenced the appropriation is not final, for it is not made by the authority of the other party, nor binding upon him (b).

The distinction between a mere intention to appropriate, and a determination of a right of election, which though somewhat subtle seems to be logical, reconciles the two cases of *Fragano v. Long* c and *Atkinson v. Bell* (d), which seem to be on the very boundary line that divides the two principles.

(a) *Heyward's Case*, 2 Coke, 36.

(b) This statement of the law was approved by Erle, J., in *Aldridge v. Johnson*, 26 L. J. Q. B. 296; 7 E. & B. 885.

(c) *Fragano v. Long*, 4 B. & C. 219.

(d) *Atkinson v. Bell*, 8 B. & C. 277.

In *Fragano v. Long* (a), in 1825, Fragano of Naples sent a written order to manufacturers at Birmingham for a quantity of hardware, to be dispatched on insurance being effected. The manufacturers at Birmingham, in pursuance of this order, packed up a cask of hardware and sent it to their shipping agents at Liverpool; it was marked with Fragano's initials, and insured on his account. The shipping agents were putting the goods on board a vessel, when, by the fault of the defendant, they were injured, and an action being brought for this wrong in Fragano's name, it was contended that it was ill brought, because the property in the goods, at the time they were injured, had not yet vested in Fragano; but the Court of King's Bench decided that the property was in Fragano from the moment the goods by his direction left the seller's warehouse at Birmingham.

In *Atkinson v. Bell* (b), before the same Judges in 1828, it was proved that Bell, the defendant, had ordered two machines to be made by Sleddon, after the pattern most approved of by a person called Kaye. Sleddon completed two machines; he afterwards altered them to suit some alteration in Kaye's machines. He then packed them in boxes, and wrote to Bell to say they were ready, and to ask by what conveyance they were to be sent. Sleddon then became bankrupt, and his assignees having brought an action for goods bargained and sold against Bell, the Court of King's Bench, with some apparent reluctance, decided that the form of action would not lie, as there was no actual [bargain and] sale. The goods remained Sleddon's goods, though he had intended them for Bell, and informed him of that intention.

There can be no doubt that Sleddon had, as far as intention could do it, appropriated the goods to Bell as firmly as the sellers had appropriated them to Fragano in the other case, and probably he had been at more expense in consequence of such an intended appropriation; but Fragano's bargain was, that the goods should be dispatched, and his

(a) *Fragano v. Long*, 4 B. & C. 219.

(b) *Atkinson v. Bell*, 8 B. & C. 277.

seller had begun to dispatch them. Sleddon had done nothing under his contract with Bell: he had only made great preparations for doing something. For all that had been done, Sleddon might still have supplied Bell with any two other machines answering the description; but if Bell had assented to the appropriation of these two machines the case would have been different.

In the following cases the question whether a subsequent assent had been given was considered.

In *Rhode v. Thwaites* (a), in 1827, the buyer bought twenty hogsheads of sugar, to be filled and delivered by the seller. The seller filled and delivered four, and subsequently filled sixteen others, and wrote to the buyer to take them away, and the buyer promised to do so. It was held that the property passed.

In *Elliott v. Pybus* (b), in 1834, the property was held to have passed where the buyer, having ordered a machine to be made, admitted when it was finished that it was made according to order, made a part payment on account, and requested the seller to deliver it before the balance was paid (c).

Sparkes v. Marshall (d), in 1836, was an action on a policy of insurance, and the question was, whether the plaintiff had, at the time of making the policy, any property in a particular cargo of oats. Bamford, a corn merchant, had bought of John and Son, of Youghal, 500 to 700 barrels of prepared black oats, to be shipped by them as they could get a vessel. Bamford sold to the plaintiff, on the 10th of November, 500 to 700 barrels of oats, described as to be shipped by John and Son; and on the 14th of November Bamford wrote to the plaintiff to say that the oats were coming by the *Gibraltar*, and the plaintiff showed his assent to this by immediately insuring, on his own account, the oats "per *Gibraltar*, supposed to be not yet loaded." "The question turns," said

(a) *Rhode v. Thwaites*, 6 B. & C. 388; 9 D. & R. 293.

(b) *Elliott v. Pybus*, 10 Bing. 512.

(c) *Wilkins v. Bromhead*, in 1844, 6 M. & G. 963; 7 Scott, N. B. 921.

(d) *Sparkes v. Marshall*, 2 Bing. N. C. 761.

Tindal, C. J., "upon the right of the plaintiff at the time of effecting the policy to that specific cargo of oats on board the *Gibraltar*. The plaintiff contends that those particular oats were appropriated to him; the defendant, on the other hand, contends that no specific cargo of oats was appropriated, that he had only a right of action against Bamford, and that he could recover the same damages now in such action, notwithstanding the loss of the *Gibraltar* packet. . . . This letter (of November 14th) seems to us to be an unequivocal appropriation of the oats on board the *Gibraltar* by Bamford, and this appropriation is essential to and adopted by the plaintiff . . . we therefore think the plaintiff is entitled to judgment."

In the following cases the question was, whether the property had passed, the seller having by the determination of an election, appropriated the goods to the contract.

In *Bryans v. Nix* (a), in 1839, Miles Tempany, a corn exporter at Longford in Ireland, was in the habit of consigning corn to the plaintiffs at Liverpool for sale on commission, and drawing bills on them against the consignments. On the 31st of January Tempany obtained from the captain of a boat, No. 54, lying at Longford, a boat receipt for 530 barrels of oats stated in the receipt to be then on board, by which they were made deliverable to the plaintiff's agents in Dublin. In fact, there were no oats on board at the time of signing the receipt, for the loading began on the 1st of February. On the 2nd of February, Tempany wrote to the plaintiffs enclosing the boat receipt and a bill drawn on them against these 530 barrels, which they accepted on receipt. On the 6th, 400 barrels had been put on board, and on this day Tempany, being pressed, gave the defendants a delivery order on his agent in Dublin for oats on board No. 54 and other boats. On the 9th the loading was complete, and Tempany induced the captain to sign a new boat receipt, making the oats deliverable to the defendants, who subsequently obtained possession. The Court

(a) *Bryans v. Nix*, 4 M. & W. 775.

held that the oats had not been appropriated to the plaintiffs. The grounds of the decision appear to have been that the boat receipt sent to the plaintiffs purported to be an undertaking by the captain to retain for them goods then in his possession, when, in fact, there were none, and was therefore meaningless ; and was not evidence of Tempany having appropriated similar goods to them which subsequently came into the captain's possession. And that as to these goods there was no evidence that Tempany had appropriated them to anyone before the 9th, on which day the captain was made the agent of the defendants to hold for them.

In *Aldridge v. Johnson* (a), in 1857, it was agreed that the plaintiff should give Knights 32 bullocks and a sum of 23*l.*, and should have in exchange 100 qrs. of oats forming part of a bulk of 200 to 300 qrs. then lying in Knights' warehouse. The plaintiff sent sacks for the oats, of which 155 were filled by Knights' order. Knights then, finding himself in embarrassed circumstances, had the sacks emptied back into the bulk, and subsequently the defendant, his assignee in bankruptcy, claimed the oats. But the Court held that the property had passed to the plaintiff. Erle, J., said the decisive act was putting the portion into the sacks (b).

The case of *Langton v. Higgins* (c), in 1859, followed *Aldridge v. Johnson* (a). Bottles which the plaintiff had sent to be filled with peppermint oil, were filled and weighed, and the Court held the property had passed.

In *Falk v. Fletcher* (d), in 1865, De Mattos, of London, chartered a vessel from the defendants, to load a cargo of salt at Liverpool, and proceed with it to Calcutta. The captain was to apply to the plaintiff at Liverpool for a cargo. The course of business between the plaintiff and De Mattos was for the plaintiff to put the salt on board any ship chartered by De Mattos, to take the mate's receipts for the quantities as put on board, exchanging them afterwards

(a) *Aldridge v. Johnson*, 26 L. J. Q. B. 296 ; 7 E. & Bl. 885.

(b) But see *Jenner v. Smith*, *post*, p. 144.

(c) *Langton v. Higgins*, 28 L. J. Ex. 252 ; 4 H. & N. 402.

(d) *Falk v. Fletcher*, 34 L. J. C. P. 146 ; 18 C. B. N. S. 403.

for a bill of lading making the salt deliverable to the plaintiff or his assigns, and to send it and the invoice to De Mattos, together with a draft for his acceptance.

In this case the plaintiff had put on board 1,007 tons of salt when he heard that De Mattos had stopped payment; he immediately stopped loading, and proposed to the defendants either that he should complete the loading on his own account, or that they should purchase the salt already on board, or give him a bill of lading for that quantity; but defendants declined all his proposals and sailed for Calcutta, where the salt was sold at a loss by their agents. It was contended for the defendants that the property in the salt had passed to De Mattos by delivery on board the vessel (a), and that taking the mate's receipts was nothing more than a means of ascertaining the quantities. The jury found a verdict for the plaintiff on the ground that he did not intend when he put the salt on board to pass the property to De Mattos or to part with control of it, and the Court refused to grant a new trial.

In *Campbell v. The Mersey Docks and Harbour Board* (b), in 1863, the plaintiff had purchased 250 bales of cotton out of a cargo of 500. When the 500 bales were landed, they were all marked in one way and not numbered, but the dock company's servants numbered them at the time of landing. The company gave the plaintiff a warehouse certificate for 250 bales, describing them as numbered from 1 to 250. Subsequently the company informed the plaintiff that 200 of the 250 bales numbered 1 to 250 had been inadvertently delivered to other persons, and offered to substitute other numbers, which offer the plaintiff declined. The jury found that the only evidence of an appropriation was a mistake of the company's clerk, and on the motion it was held that the property had not passed.

In *Ex parte Pearson, in re The Wiltshire Iron Co.* (c), in 1868, Pearson, who was unaware that a petition for winding

(a) See *Moakes v. Nicholson*, post, p. 169; 34 L. J. C. P. 273; 19 C. B. N. S. 290.

(b) *Campbell v. Mersey Docks*, 14 C. B. N. S. 412.

(c) *Ex parte Pearson, in re Wiltshire Iron Co.*, 37 L. J. Ch. 554; 3 Ch. App. 443.

up The Wiltshire Iron Co. had been presented, purchased 200 tons of iron from the company, who placed the iron in trucks and sent invoices to Pearson signifying the consignment. The trucks were moved from the company's works on to the line of the Great Western Railway Co., in whose custody they were when the winding-up order was made. It was held the property had passed.

In *Jenner v. Smith* (a), in 1869, the plaintiff showed the defendant a sample of hops of which he then had three pockets lying in a London warehouse. The defendant agreed to buy two of them at £7 15s. per cwt.: they were to be left in the warehouse until he wrote for them. Some days afterwards, the plaintiff instructed the warehouseman to set apart two of the pockets, which was done, and a card with the defendant's name was placed on them, but they were not transferred in the warehouse books. Subsequently the plaintiff sent the defendant an invoice showing the weights, but there was nothing to show that the defendant had abandoned his right to see that the bulk corresponded with the sample, or to see them weighed, and the Court held the property had not passed; the defendant had neither assented to the seller's appropriation, nor given the seller authority to appropriate for both. Keating, J., at p. 276, pointed out the distinction between this case and *Aldridge v. Johnson* (ante, page 142) where "the bulk of the barley had "been inspected and approved, and all that remained to be "done was to sever and measure the portion to be appropriated to the vendee; and that the vendor had filled a "number of sacks which had been sent by the vendee, "thereby measuring it. The barley which was to be appropriated to the fulfilment of the contract was, therefore, "severed from the bulk and measured with the assent of "both parties. There could be no doubt that the property "in the barley so dealt with passed."

In *Stock v. Inglis* (b), in 1882, the question was considered

(a) *Jenner v. Smith*, L. R. 4 C. P. 270.

(b) *Stock v. Inglis*, 9 Q. B. D. 708; 12 Q. B. D. 564; 10 App. Ca. 263.

at great length, whether the property in bags of sugar had passed where the seller had not at the time of the loss elected which of certain bags to appropriate to a particular contract.

So far those contracts have been spoken of which operate in law as conveyances of the property, but where the contract is not one which is intended to operate as an assignment or conveyance of the property, but is only a mere promise that an assignment will be made if a certain event shall happen, then, in order that the equitable interest which such a promise is intended to give may be created and pass, the goods must be specific, to the degree indicated in the judgments in the following case, just as they must be specific where it is intended that the property shall pass. This is decided by the case of *Holroyd v. Marshall* (a), in the House of Lords, in 1862, where it was argued that no interest passed because the goods were never sufficiently specified for the contract to attach upon them. Taylor, the occupier of a mill, covenanted to assign to Holroyd, his landlord, machinery which was not in existence at the date of the covenant, but which might thereafter be brought by him into the mill, and the principal question was, whether a mere covenant to assign would be effectual to pass any interest at all; but there was a second question, viz., assuming that it would be effectual to pass an interest in the goods, provided they were sufficiently specific, whether the machinery was sufficiently specific in this particular case. The House of Lords held that the covenant was effectual to pass an equitable interest, and that the goods were sufficiently specific.

The judgment of Lord Westbury, L. C., is most instructive, and is again cited in the chapter on Equitable Assignments (b). He said, "A contract for the sale of goods, as, "for example, of 500 chests of tea, is not a contract which "would be specifically performed, because it does not relate "to any chests of tea in particular; but a contract to

(a) *Holroyd v. Marshall*, 33 L. J. Ch. 193; 10 H. L. R. 191.

(b) *Post*, p. 291.

"sell 500 chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed."

In *Lunn v. Thornton* (a), in 1845, there was a covenant which was in terms, that one party "sold and delivered" goods which he then had or thereafter might have. The action was trover, which put in issue the fact whether the property in the after-acquired goods had passed, and the Court of Common Pleas held that it had not. This case is quite consistent with the preceding one. At law the property had not passed.

The case of *Belding v. Read* (b), in 1865, was hardly consistent with the law as laid down in *Holroyd v. Marshall* (c), and was overruled by the House of Lords, in 1888, in the case of *Tailby v. Official Receiver* (d). In *Belding v. Read* the debtor made an assignment of all his household furniture, &c., then being or thereafter to be upon his dwelling-house at Reedham or elsewhere in the United Kingdom. Subsequently one of his creditors seized goods in the house, and a horse and gig standing at livery at Yarmouth, all of which had been purchased after the agreement. The Court held that the agreement did not attach on those goods, for they had never become specific as in *Holroyd v. Marshall* (c); but in *Tailby v. Official Receiver* (d) the House of Lords expressed the opinion that the learned Judges who decided the case had misapprehended the doctrine laid down by Lord Westbury in *Holroyd v. Marshall*, being possibly misled by the reference made by the noble Lord to specific performance.

Leatham v. Amor (e), in 1878, was a very similar case to *Holroyd v. Marshall* (c).

(a) *Lunn v. Thornton*, 14 L. J. C. P. 161; 1 C. B. 379.

(b) *Belding v. Read*, 34 L. J. Ex. 212; 3 H. & C. 955.

(c) *Holroyd v. Marshall*, 33 L. J. Ch. 193; 10 H. L. R. 191.

(d) *Tailby v. Official Receiver*, 58 L. J. Q. B. 75; 13 A. C. 523; see also *In re Clarke, Coombe v. Carter* (1887), 56 L. J. Ch. 981; 36 Ch. D. 348; and the chapter on Equitable Assignments, *post*.

(e) *Leatham v. Amor*, 47 L. J. Q. B. 581. See also *Lazarus v. Andrade*, in

The case of *In re Count D'Epineuil* (a), in 1882, where Fry, J., held that a charge in favour of a creditor of all present and future personalty was effectual only to charge the property which belonged to the debtor at the date of the agreement (b), followed *Belding v. Read*, and was also overruled by *Tailby v. Official Receiver* (supra).

There may possibly be some doubt whether the true principle of those cases, which settle that goods dispatched by the seller are the property of the buyer, is, that the seller has, by dispatching them, exercised and determined a right of election, though it is difficult on any other principle to reconcile them with those cases which decide that a delivery to a carrier, and a receipt by him, do not make a contract good within the Statute of Frauds or the Sale of Goods Act. For if the principle were that the carrier had authority from the buyer to consent to an appropriation, he would surely have authority also to *accept* the goods within the meaning of the statute, but that it is settled he has not (c).

That the dispatch does vest the property in the buyer there can be no doubt. As long since as 1803, Lord Alvanley, in delivering the judgment of the Court, in *Dutton v. Solomonson* (d), said: "When this point was first mentioned I was surprised, for it appeared to me to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he does not name any carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser, the whole property immediately vests in him: he alone can bring an action for any injury done to the goods, and if any accident happen to the goods it is at his risk. . The only exception to the purchaser's right over the goods is, that the vendor,

1880, 49 L. J. C. P. 847; 5 C. P. D. 318; *Clements v. Matthews*, in 1883, 52 L. J. Q. B. 772; 11 Q. B. D. 808; *Reeves v. Barlow*, in 1884, 11 Q. B. D. 610; 12 Q. B. D. 436.

(a) *In re Count D'Epineuil*, 20 Ch. D. 758.

(b) *In re Panama, New Zealand and Australian Royal Mail Co.*, in 1870, 39 L. J. Ch. 482; 5 Ch. App. 322.

(c) *Ante*, p. 23.

(d) *Dutton v. Solomonson*, 3 B. & P. 582; and see Sale of Goods Act, s. 32.

"in the case of the former becoming insolvent, may stop them *in transitu*. On this part of the case, therefore, the "Court has never entertained any doubt." It is to be observed that Lord Alvanley joins two propositions together (both perfectly undoubted law): that when goods are by agreement to be sent by a carrier, the delivery of the goods to the carrier amounts to a *prima facie* appropriation of the goods to the buyer, and vests the property in him, and that it is a delivery to the buyer; that the goods are both sold and delivered. In most of the cases both of these things existed; at the moment of time when it became necessary to determine whose property the goods were, they were both sold and also delivered, but to the carrier, and therefore only *in transitu*: but it was not so in *Fragano v. Long (a)*, where the goods were appropriated, but were still in the hands of the seller's agent. There was in that case an objection made that the property remained in the seller, because he and his agents still retained the possession of the goods, so as never to have parted with his rights as an unpaid seller. Bailey, J., expressly says that there might be a difficulty as to that, if the seller and his shipping agents were setting up an adverse interest, but not in the present case. The decision, therefore, in that case was, that the goods were bargained and sold, and that it was not material to inquire whether the *transitus* had commenced or not. This is not a merely theoretical distinction: a trader who receives an order for goods of a particular description, to be dispatched by sea, very often with a view of preserving his lien, has the bills of lading made out to his own order, so as to secure that the goods shall not be delivered till paid for, and it is worth consideration under what circumstances by doing so he prevents the shipment operating as an appropriation of the specific goods, and so retains in himself the general property, and consequently the liability to loss during the voyage.

If the reason why the delivery of the goods to the carrier *prima facie* appropriates them to the contract of sale and vests

(a) *Fragano v. Long*, 4 B. & C. 219, ante, p. 139.

the property in the buyer, is that the carrier is an agent of the buyer, having authority to receive the goods for him, it follows that when the carrier receives the goods under a contract with the seller, by which he agrees to keep possession of the goods subject to the seller's orders, the property is not transferred, for in such a case it is clear that the carrier does not receive the goods as an agent for the buyer.

But this consequence does not necessarily follow, if the reason why the delivery of the goods to the carrier appropriates the goods and vests them in the buyer, is that it amounts to a determination of a right of election given to the seller by the contract under which he is to dispatch the goods. The seller's attempt to retain a right of possession may sometimes prevent the delivery to the carrier from operating as a determination of the seller's right of election, but it will not necessarily do so. Whether it does or not must depend upon the intention with which they were delivered, and the terms of the contract by which the seller is bound to dispatch them.

In some cases the terms of the agreement of sale prevent any question from arising. Thus in *Swain v. Shepherd* (a), in 1832, at Nisi Prius, before Parke, B., in which the seller sued the carrier for the loss of the goods, the learned Judge told the jury that if they believed the evidence that the goods were sent on a contract of sale, if approved of, if not, to be kept to be returned, the plaintiff was the proper party to sue. It is quite obvious that the circumstance of a carrier intervening in this case was purely accidental, and had nothing to do with the vesting of the property. If the seller had literally with his own hands delivered them into the hands of the buyer on those terms, the property must have remained in the seller until the buyer had approved of the goods, or failed to return them.

In all cases the terms of the agreement are of great consequence, for the first question is, whether the goods have been appropriated pursuant to the authority conferred by the

(a) *Swain v. Shepherd*, 1 M. & R. 223.

agreement, so as to vest the general property in the buyer, and then it may become a further question how far the terms with which the seller has clogged the appropriation are binding or not, and that too must depend upon the terms of the agreement.

Now in considering whether an intention to pass the property existed in any contract, it will be well to contrast two classes of cases—firstly, where the seller delivers direct to the buyer or his agent without the intervention of a third person acting as the agent of neither but as a carrier; and secondly, where such a person does intervene. For the seller's interest in these two cases may probably not be the same.

If no carrier intervenes, the unpaid seller, until he has parted with the possession, has at least his lien for the purchase-money, and may withhold the goods until he is paid, notwithstanding that the property may have passed, and may have, by the terms of the contract with the buyer, a further right to retain possession until the happening of some event, and this also although the property may have passed, and, therefore, in the majority of cases it is to his advantage to have passed the property, and with it the risk (a).

In the case of *Sweeting v. Turner* (b), in 1872, Blackburn, J., said: "It is thoroughly established that by the English law, where a bargain and sale is completed with respect to goods, and everything to be done on the part of the vendor before the property should pass has been performed, then the property vests in the purchaser, although the vendor still retains his lien, the price of the goods not having been paid; and any accident happening to the things subsequently, unless it is caused by the default of vendor—any calamity befalling them after the sale is completed—must be borne by the purchaser, and, by parity of reasoning, any benefit to them is his benefit, and not that of the vendor."

But where a carrier intervenes, the seller's interest is

(a) See Sale of Goods Act, sections 41, 42, and 43.

(b) *Sweeting v. Turner*, 41 L. J. Q. B. 58; L. R. 7 Q. B. 310.

rather the other way. If the seller delivers the goods into the carrier's hands, and the property has passed, his lien (a) is gone, for he has parted with the possession to the carrier, and any right given him by contract to withhold possession is not one of which the carrier can, acting on the seller's behalf, avail himself, and the buyer has the right to demand the goods from the carrier. In this case, therefore, it is to the seller's interest that the property should not have passed.

When, therefore, the seller delivers the goods to the carrier instructing him to deliver them to him, the seller, or his agent, at the other end of the journey, the presumption is that the property was not intended to pass. The commonest case of this sort is where the shipper or consignor takes a bill of lading from the captain making the goods deliverable to himself or his agent. This reservation of control over the goods by retaining the property in them has been termed the reservation of the *jus disponendi*, and is formulated in section 19 of the Sale of Goods Act, as follows :—

“19.—(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

“(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

“(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading

(a) A lien is a personal right which cannot be parted with, and continues only so long as the possessor holds the goods: *per* Parke, B., in *Legg v. Evans*, in 1840, 6 M. & W. 42. See also *Donald v. Suckling*, in 1866, 35 L. J. Q. B. 232; L. R. 1 Q. B. 603.

“to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.”

The seller cannot protect himself where the property has passed, by saying to the carrier, “Do not deliver the goods to the buyer, but deliver them to my agent,” and by the carrier agreeing to this; such a contract might be good between the carrier and the seller, but it could not deprive the buyer of such rights as the contract with the seller has already given him, and the carrier would be a wrongdoer in withholding delivery.

The law is the same if the goods are delivered to a carrier by land, for as far as regards the vesting of the property, the bill of lading has no peculiar legal effect: it is a direction to the shipowner as to the person to whom he is to give the goods, and a contract on his part to give them according to that direction, and has precisely the same effect on the vesting of the property that a verbal agreement to the same effect would have had. It is very strong evidence of what the shipper intended in shipping the goods, but his intention has not the more effect because it is expressed in the shape of a bill of lading. If the seller and the buyer have come to the binding agreement, that the buyer is to have forthwith certain goods, the seller cannot, without the consent of the buyer, add fresh conditions; and if he orders the actual holder to keep back the goods till the buyer has done something, which he is not bound to do, the order is void, and the holder obeys it at his peril, and it is no matter that the holder is a shipowner, and the order in the shape of a bill of lading. The buyer has a right to say to the shipowner or captain, “They are my goods, give me them; if you have made promises to the shipper inconsistent with my rights, look you to that.” But the case is quite different if the original bargain rendered either the passing of the property or the right of possession conditional. The seller then has a right to insist as against the buyer on the fulfilment of those conditions contained

in the original bargain, and the form of the bill of lading is of great weight as evidence, to show whether he insists upon that right. Neither is there any peculiar legal effect in an invoice, but the terms of the invoice afford very strong evidence of what the terms of the agreement of sale are, and also of the seller's intention to appropriate the specific goods, and the question, whether the directions not to deliver are contrary to the bargain, is, therefore, often decided by the terms of the invoice as a matter of evidence. Bearing these matters in mind, it is not difficult to reconcile *Coxe v. Harden* (a) with *Brandt v. Bowlby* (b), though at first glance they seem directly opposed to each other.

If, for example, the seller had contracted to sell 1,000 qrs. of wheat, and had put 1,000 qrs. on board, it is a question of fact whether those 1,000 qrs. had been ascertained or specified as the subject of the contract: if they have, then the seller can tender them, only, and the buyer is bound to accept them, only. But it is a further question of fact whether the property has passed. It will pass unless the seller has shown that it was his intention that it should not pass. Then comes the question whether the seller had any right or power to give effect to that intention. That must depend on the contract. The seller cannot vary it at pleasure. If the intention of the parties to be gathered from the terms of the contract was, that the property should pass at once, or when placed on board, or when delivered at a certain port, or when bills drawn against the goods had been accepted, or when bills drawn against the goods had been paid, or on the happening of any other event, it is not in the seller's power to vary the contract, or, as it is sometimes expressed, to vary the consignment, and to say that the property shall pass at some time other than that agreed upon. But if he has the right to give effect to that intention consistently with the contract, he can do so; and the question is one of fact, Did such an intention exist? Of this the terms of the bill of lading are very strong evidence. But

(a) *Coxe v. Harden*, 4 East, 211, *post*, p. 156.

(b) *Brandt v. Bowlby*, 2 B. & Ad. 932, *post*, p. 159.

all cases of consignment are not from a seller to a buyer. In many cases a consignor consigns to an agent, and not to a buyer, and raises money on the consignment by drawing on his agent, negotiating the bills with a bank, and pledging the bills of lading with the bank as security : and this he may do on any terms he may choose, for he is consigning to his own servant.

A letter to the bank authorizing them to sell the consignment in case the bills are not paid is the ordinary letter of hypothecation. If the letter authorizes the bank to sell all consignments for which bills of lading may in future come into their hands, it is called a general letter of hypothecation.

There are two early cases on this subject which seem to have been decided upon the same principle. In each of them the Court decided that both the property and right of possession were vested in the buyer and consignee, whilst in *Brandt v. Bowlby* (a) the judgment of the Court was, that neither was vested, and in *Wilmshurst v. Bowker* (b), that only the right of property was vested ; but the principle seems to be the same. The Court seem to have considered the correspondence and evidence carefully, to see whether the goods were shipped with the intent to appropriate them to the agreement, and then to have considered whether the seller, under the agreement, had a right to retain the possession, for the facts showed beyond a doubt that he had a wish to do so.

The first of those cases was *Walley v. Montgomery* (c), in 1803. The facts, as reported, were, that Walley, at Liverpool, gave Schumann and Co., of Memel, an order for timber. Schumann and Co. wrote to him on the 1st of May to say they had chartered on his account the ship *Esther* ; and on the 15th May they wrote him another letter, enclosing a bill of lading and an invoice, and informing him that they had drawn on him at three months for the price of the timber ; none of those letters are set out in the report, which

(a) *Brandt v. Bowlby*, 2 B. & Ad. 932, *post*, p. 159.

(b) *Wilmshurst v. Bowker*, 7 M. & G. 882 ; 8 Scott, N. R. 571, *post*, p. 161.

(c) *Walley v. Montgomery*, 3 East, 585.

greatly lessens its value. The invoice was of this tenor : "Memel, 9th May. Invoice of a cargo of timber shipped by "order and for account and risk of Mr. T. Walley, at Liverpool, "in the *Esther*"; and the bill of lading was "to order or "assigns, he or they paying freight," and was indorsed in blank by Schumann and Co. Schumann and Co. sent their correspondent, Montgomery, another bill of lading, under which and by their directions he got possession of the cargo. Walley, who was not insolvent, demanded the goods of Montgomery, and offered to accept the drafts drawn on him by Schumann and Co., but Montgomery refused to let him have them unless he would pay ready money. Walley would not pay ready money; he did not tender the freight which Montgomery paid. Montgomery sold the cargo, and Walley brought trover against him, and the question was, whether Walley had the right of property and possession in the cargo or not. Montgomery seems to have been treated by the Court as identified in interest with Schumann and Co. Lord Ellenborough, at the trial, looking at the correspondence and the bill of lading only, thought Schumann and Co. had appropriated the goods to be Walley's if he accepted the bills and paid the freight, and not till then. He had offered to accept the bills, so that the first condition was fulfilled; but he had not offered to pay the freight, and therefore he was nonsuited. The King's Bench granted a new trial. Lord Ellenborough said that he should have retained his opinion had it not been for the invoice, to which his attention had not been called at the trial; he thought that showed that the appropriation was absolute. Grose, J., said: "The defendant was the mere agent of Schumann "and Co., out of whom the property was divested by the "bill of lading and invoice, and the delivery to the captain "for every purpose except that of stopping *in transitu*. . . . "No man can make another his debtor against his will " . . . there was no duty in the plaintiff to pay the "defendant the freight, because he was a *tortfeasor*: standing "as Schumann and Co. he was detaining the goods from the "plaintiff after having passed the property to him."

The other case was *Coxe v. Harden* (a), also in 1803. In that case Browne and Co., of Rotterdam, had an order from Oddy and Co., of London, for flax. The terms of the order are not given in the report, nor the manner in which the first part of it was performed. On the 12th of February, 1802, Browne and Co. wrote to Oddy and Co. as follows: "We have the pleasure of handing to you a bill of lading, and invoice of the remainder of the flax we purchased for your account, by order of Mr. Oddy, consisting of eighteen mats, which are shipped in *Vrow Jeannette* for your place, the amount being 317*l.* 0*s.* 10*d.* We have this day drawn on you at two usances in favour of Lacon, Fisher and Co., not doubting it will meet due honour." The bill of lading which was sent to Oddy and Co. was unindorsed, and Oddy and Co. being in difficulties, transferred it to Harden the defendant, who, as the bill was unindorsed, stood in exactly the position of Oddy and Co. Then Oddy and Co. failed, and Browne and Co. having transmitted an indorsed bill of lading to Coxe, he brought trover against Harden, who had obtained possession of the goods by means of the unindorsed bill of lading. The Court of King's Bench thought Coxe could not sue in his own name, but they said it was not necessary to decide that, for Browne and Co. could not have sued in their own name. As Harden had actually received the goods, no question on stoppage *in transitu* arose, and the question in the case was, whether the right of property and possession in the goods had passed from Browne and Co. to Oddy and Co. or not. Neither the terms of the order nor of the invoice are given in the report, but in argument it is asserted, "that the property was vested in them without any words of condition annexed, *scilicet* if they honoured the bill," and each of the Judges assumes in his judgment as a starting point, that it was clear that Oddy and Co., if they continued solvent, were to have immediate possession. It seems, therefore, not too much to infer, that the original agreement was one by which the sellers were not

(a) *Coxe v. Harden*, 4 East, 211.

to retain a right of possession till the bills were honoured ; and, consequently, that the directions to the captain not to deliver to Oddy and Co., signified by the bill of lading being unindorsed, were no part of the bargain, and not such as (if Oddy and Co. had continued solvent) could have been enforced against them.

In the case of *The Constantia*, in 1807 (a), Lord Stowell pointed out the great importance of the terms of the contract of sale, upon the right of the consignor to control the goods after they have been put on board ship. In that case, some brandy taken on board the ship was claimed by a neutral, Kye, who was the consignee. The captors insisted that the brandy remained the property of the consignor, who was an enemy. The facts seem to have been, that Kye ordered the brandy of the consignor, who put it on board the ship at Cette, and had bills of lading made out, which expressed that the brandy was shipped on account of Kye, and at his risk. Drafts were drawn by Kye's directions on his correspondent, who dishonoured them by mistake, and the consignor, under a mistaken idea that Kye was insolvent, took legal steps in Cette, by which the master of the ship was ordered not to deliver the goods to Kye, but to the consignor's agent: the order of revocation was peremptory. It was proved that Kye was in reality solvent, and that the consignor was under a mistake. The letters containing Kye's orders for the brandy were not at first before the Court. Lord Stowell, after pointing out with great clearness that the consignor had, in fact, made a revocation, and that, therefore, the only question was, if he had a right to make it, and that neither by the law of England nor of France was there an unlimited power of stoppage *in transitu* in the one country, or revendication in the other, except where the buyer had failed, said that in this case Kye was not insolvent, and, therefore, the goods were Kye's, " unless it can be shown " that the right of the shipper extends further than I have " stated it, and that it amounts to an unlimited right to vary

(a) *The Constantia* (Henrickson), 6 Rob. 351.

“ the consignment at pleasure ; where goods are shipped
“ without orders, such a right exists. The seller, if he may
“ be so described, retains an absolute power over them, for
“ there is no purchase. But when orders have been received
“ and executed, and delivery has been made to the master of
“ the ship, and bills of lading signed, the seller is *functus*
“ *officio*, except in the peculiar case in which he is again
“ reinstated by the privileges of the *vendeur primitif*. That
“ will make it a matter of fundamental importance, that the
“ letters containing the original order should be produced.
“ The mercantile law I take to be clear and distinct, that the
“ seller has not a right to vary the consignment, except in
“ the case above stated. The mischief and inconvenience
“ that would ensue on a contrary supposition, are extreme.
“ The goods might be put on board, and might lie at the
“ risk of the consignee for two or three months, and if the
“ consignor could come and resume them at pleasure, it
“ would place the consignee in a situation of great dis-
“ advantage, that he should be exposed to the risk during
“ such a length of time, for an object that might eventually
“ be defeated at any moment, by the capricious or interested
“ change of intention in the breast of the consignor ; it
“ would be to expose the consignee altogether to the mercy
“ of the consignor.”

In *Ogle v. Atkinson* (a), in 1814, Smidt and Co. of Riga, having funds of the plaintiff's in their hands, purchased flax at his request, for which he sent his own ship. Smidt and Co. put the flax on board, telling the captain that it was the property of the plaintiff, and as such the captain received it. They induced the captain to sign bills of lading making the flax deliverable to blank or order, and sent it to their agent in this country with instructions to get the plaintiff's acceptance for 2,500*l.*, which sum they conceived would be due to them on balance. The plaintiff declined to give his acceptance, and the warehouseman refused to give him possession. The Court held that the property passed absolutely to the

(a) *Ogle v. Atkinson*, 5 Taunt. 759.

plaintiff on delivery on board his ship, Gibbs, C. J., pointing out that if the flax had been delivered to the captain to be the property of the plaintiff on condition that he accepted certain bills, the case would have been different.

In *Craven v. Ryder (a)*, in 1816, the contract was for the sale of 24 hogsheads of sugar, from Craven to French, free on board a British ship, two months' credit. Craven put 24 hogsheads on board the defendant's vessel the *George*, which was that named by French, but retained the lighter-man's receipt, which expressed them to be shipped for and on account of him, Craven. The Court of Common Pleas decided, that Craven had never parted with the right of possession. Gibbs, C. J., said, "that the plaintiffs might "refrain from delivering the goods, unless under such circumstances as would enable them to recall the goods if "they saw occasion." It seems very doubtful whether the property had passed under such circumstances from the seller so as to free him from the risk of loss, but there was no occasion to decide that in *Craven v. Ryder (a)*. It would seem from *Coxe v. Harden (b)*, that if the goods in *Craven v. Ryder (a)* were appropriated to the contract, which was on credit, Craven had no longer power to control the possession; and from the following case of *Brandt v. Bowlby (c)*, it would seem that the appropriation was not complete by the mere delivery on board the ship, unless it was done with the intention of appropriation.

In *Brandt v. Bowlby (c)*, in 1831, the Court of King's Bench decided that the property in a cargo of wheat remained in the seller. The decision turned entirely on the peculiar circumstances. These seem to have been that Berkeley, of Newcastle, having agreed to purchase wheat of the plaintiffs, merchants at St. Petersburg, payment to be by drafts on London, chartered a vessel of the defendant, Bowlby, and sent it to receive the wheat. Then Berkeley and the agents of the plaintiffs in England quarrelled, and Berkeley wrote to

(a) *Craven v. Ryder*, 6 Taunt. 433.

(b) *Coxe v. Harden*, 4 East, 211.

(c) *Brandt v. Bowlby*, 2 B. & Ad. 932.

cancel every order he had given (which he had clearly no right to do). The plaintiffs wrote to say that they would nevertheless load the vessel, hoping it would meet Berkeley's approval. They did load the vessel, but took the bills of lading to their own order. They sent one of the bills of lading indorsed to their agent, another they sent unindorsed to Berkeley, and at the same time informed him of what they had done, and that they had drawn partly on him and partly on London for the price. Berkeley refused to accept the draft on him, or to allow the house in London to accept on his account. When the ship arrived the price of wheat had risen, and Berkeley obtained the cargo from the defendants against the will of the plaintiffs, whose agents held the indorsed bills of lading. The plaintiffs brought an action on the contract for a delivery contrary to the bill of lading, and recovered as damages the value of the cargo at the port of discharge. The defendants' counsel moved to reduce the damages, because the plaintiffs had no right of possession, in which case the damages should be only nominal, or at least no more than an unpaid seller's right of possession, in which case the measure of damages should be the invoice price; but the Court refused a rule on both points. The Court seems to have come to the conclusion from the correspondence, that the goods were not shipped for the purpose of appropriating them to the fulfilment of the still existing contract which Berkeley had tried to cancel, but for the purpose of offering to Berkeley a substituted contract, which he declined. When once this construction was put upon the facts, the case became identical in principle with *Swain v. Shepherd* (a).

Ruck v. Hatfield (b), in 1832, was a case nearly similar to *Craven v. Ryder* (c). The shipowner there, however, had refused to give a receipt, and it is to be observed, that Lord Tenterden, in *Abbott on Shipping* (d), cites the case as an

(a) *Swain v. Shepherd*, 1 M. & R. 223.

(b) *Ruck v. Hatfield*, 5 B. & Ald. 632.

(c) *Craven v. Ryder*, 6 Taunt. 433.

(d) *Abbott on Shipping*, 14th ed., 840.

authority that under such circumstances the seller retains his rights, "at least as against the master of the ship," so that it appears he did not consider it clear that, as against the buyer, the seller could retain any control after shipment.

In *Alexander v. Gardner* (a), in 1835, the plaintiffs, merchants in London, contracted to sell to the defendants, butter which they were expecting from Ireland. The broker's note was in these terms:—"London, Oct. 11, 1833. Sold to "Messrs. William Gardner and Son, for account of Messrs. "Alexander and Co., 200 firkins Murphy and Co.'s Sligo "butter, at 71s. 6d. per cwt., free on board for first quality. ". . . Payment, bill at two months from the date of landing. "To be shipped this month." The butter was not shipped until November, but the defendants waived any objection on that score, and retained the invoice and bill of lading, which had been indorsed to and delivered to them. In December the vessel with the butter on board was wrecked. The Court held that the property had passed to the defendants.

In *Wilmshurst v. Bowker* (b), in 1841, the defendants entered into this written contract with the plaintiffs:—"Sold "to Messrs. Wilmshurst and Son, about 300 quarters of wheat, "as per sample, at 2*l.* 11s. per quarter on board. Payment by "banker's draft on London, at two months date, to be remitted "on receipt of the invoice and bill of lading." The defendants shipped 310 quarters on board a vessel, and took bills of lading deliverable to their order or assigns. They insured the goods, and in pursuance of an agreement with the plaintiffs, charged them with the premiums as well as the price of the wheat. They forwarded an indorsed bill of lading and an invoice to the plaintiffs, who sent them back a draft, but not a banker's draft. The defendants instantly returned it, and resold the wheat at an advanced price. The plaintiffs having failed in an action in trover (c), on the ground that they were not entitled to the possession of the goods, as they had not given the banker's draft, now moved for judgment

(a) *Alexander v. Gardner*, 1 Bing. N. C. 671.

(b) *Wilmshurst v. Bowker*, 2 M. & G. 792.

(c) *Wilmshurst v. Bowker*, 5 Bing. N. C. 541.

non obstante veredicto. There was no complaint of what seems to have been the real wrong, the over hasty resale. The Court of Common Pleas, after taking time to consider, decided that the property was in the plaintiffs, but that on the true construction of the contract the defendants were to have a right to retain possession until the delivery of a banker's draft. On appeal (a), the Court seems to have been of the same opinion as the Court of Common Pleas as to the passing of the property, but to have reversed that Court on the construction of the contract. From the shape in which the question came before the Court (a motion for judgment *non obstante veredicto*), it was a fact admitted on both sides that "the defendants, by order of the plaintiffs, caused the "goods to be shipped for the account and at the risk of the "plaintiffs," so that the Court had no occasion to decide whether the appropriation owed its validity to a prior authority contained in the agreement, or to a subsequent assent on the part of the plaintiffs. In point of fact, there seems to have been ample evidence of both.

Ellershaw v. Magniac (b) was tried in 1843, but was not reported until 1851. The plaintiff, a merchant in Leeds, contracted with J. and J. Cortazzi, who carried on business in London and Odessa, to buy a cargo of linseed. The Odessa partner, before any linseed had been shipped, drew two bills on the plaintiff on account of the linseed, which were accepted by the plaintiff and paid when due. The plaintiff chartered the *Woodhouse*, and sent her to Odessa to take on the cargo. When she was loaded the Odessa partner wrote to his London partner, "With regard to your "sales of linseed, Mr. Ellershaw will receive a part by the "*Woodhouse*." He then obtained a bill of lading making the cargo deliverable to order or assigns. The Odessa house, being in difficulties, indorsed the bill of lading for value to the defendants, who claimed the cargo, as holders, on the arrival of the ship at Hull. The Court, consisting of Lord

(a) *Wilmshurst v. Bowker*, in 1844, 12 L. J. C. P. 475; 7 M. & G. 882; 8 Scott, N. R. 571.

(b) *Ellershaw v. Magniac*, 6 Ex. 570.

Abinger, C. B., and Barons Parke and Alderson, held that the property had not passed to the plaintiff.

Wait v. Baker (a), in 1848, is often cited as a leading case on this subject. The defendant, who was a corn factor at Bristol, contracted by letters with Lethbridge, a corn factor at Plymouth, to buy from him 400 to 500 qrs. f.o.b. of barley, at Kingsbridge or neighbouring port, for cash, on handing bills of lading, or acceptance at two months date. Lethbridge was informed, in answer to inquiries, that he was to charter a vessel, and accordingly he chartered the *Emerald*. The captain signed a bill of lading making the barley deliverable at Bristol, to the order of Lethbridge or assigns, freight as per charter. Lethbridge then went to Bristol, and early in the morning called at the defendant's office, and there left the invoice and an unindorsed bill of lading. He called again later on in the day, when some dispute arose, and although the defendant said he accepted the cargo, and offered to pay cash, Lethbridge declined, and took away the bill of lading and indorsed it to the plaintiffs for value. When the *Emerald* arrived the defendant obtained possession of part of the cargo. The Court held that the property had not passed to the defendant.

Parke, B., after pointing out that although a delivery to a carrier is, if nothing further takes place, a delivery to the buyer so as to vest the property in him, but that this was not such a case, said: "The delivery of the goods on board
"the ship was not a delivery of them to the defendant, but a
"delivery to the captain of the vessel, to be carried under a
"bill of lading, and that bill of lading indicated the person
"for whom they were to be carried. By that bill of lading
"the goods were to be carried by the master of the vessel
"for and on account of Lethbridge, to be delivered to him
"in case the bill of lading should not be assigned, and if it
"should, then to the assignee. The goods therefore still
"continued in possession of the master of the vessel, not as
"in the case of a common carrier, but as a person carrying
"them on behalf of Lethbridge."

(a) *Wait v. Baker*, 17 L. J. Ex. 307; 2 Ex. 1.

In *Jenkyns v. Brown* (a), in 1849, the plaintiff, a merchant in London, instructed his agents, Klingender and Co., of New Orleans, to purchase corn. Klingender and Co. did so with their own money, and drew two drafts on the plaintiff. Klingender and Co. took the bills of lading, deliverable to themselves. They then sold the drafts to the defendants, and indorsed the bills of lading to them as security. After the sale of the drafts they sent an invoice to the plaintiff, stating that the corn was "consigned to order, by order, and "for account and risk" of the plaintiff. The bills were presented to the plaintiff for acceptance, and accepted, and, together with the bills of lading, were deposited by the defendants with bankers. On the day when the drafts became due the plaintiff called at the bank, demanded the bills of lading, and offered to take up the drafts. He was requested to call again next day, as the drafts had been mislaid, but he did not do so. The drafts, when presented for payment, were dishonoured. The defendants sold the corn, and the Court was of opinion that the property did not pass to the plaintiff, Coleridge, J., in delivering the judgment of the Court, saying, "that taking the bills of lading deliverable to their own order was nearly conclusive evidence "that the consignors did not intend to pass the property to "the consignee."

Turner v. The Trustees of the Liverpool Docks (b), in 1851, was very similar to *Ellershaw v. Magniac* (c). The consignees sent their own ship, and the consignors took the bill of lading "unto order, or to our assigns, he or they paying "freight for the said goods, viz., for cotton in round bales, "cotton in square bales, nothing being owners' property." The invoice stated the cotton to have been shipped "by "order and for account" of the buyers, who were at the same time requested to effect insurances.

Patteson, J., in delivering the judgment of the Court,

(a) *Jenkyns v. Brown*, 19 L. J. Q. B. 286; 14 Q. B. 496.

(b) *Turner v. The Trustees of the Liverpool Docks*, 20 L. J. Ex. 393; 6 Ex. 543.

(c) *Ellershaw v. Magniac*, 6 Ex. 570.

said: "There is no doubt that the delivery of goods on board the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms, restraining the effect of such delivery. In the present case the vendors, by the terms of the bill of lading, made the cotton deliverable at Liverpool to their order or assigns, and there was not therefore a delivery of the cotton to the purchasers as owners, although there was a delivery on board their ship."

In *Key v. Cotesworth (a)*, in 1852, Kilgour and Leith, of Glasgow, wished to purchase handkerchiefs from the plaintiffs at Madras. The defendants, at the request of Kilgour and Leith, wrote to the plaintiffs saying that they, the plaintiffs, might draw on them for the price of the handkerchiefs on enclosing bills of lading. Accordingly the plaintiffs sent a bill of lading, which made the handkerchiefs deliverable to the defendants or their assigns, together with an invoice, which stated them to be "on account and risk" of Kilgour and Leith. Kilgour and Leith stopped payment, being indebted to the defendants. The defendants obtained possession of the handkerchiefs under the bill of lading, but declined to accept the drafts, which had been sent by the plaintiffs to their agents, and by them presented to the defendants for acceptance. The defendants having sold the goods, this action was brought to recover the proceeds as money received for the use of the plaintiffs. The plaintiffs were nonsuited, and the nonsuit was upheld; the Court holding that the acceptance of the bills was not a condition precedent to the passing of the property, and that it had passed to Kilgour and Leith.

It should be noticed that it was not decided here that the plaintiffs could not have recovered damages for not accepting the drafts, but merely that this form of action would not lie.

It was argued for the plaintiffs, that the acceptance of the bills was a condition subsequent, which, not being performed,

(a) *Key v. Cotesworth*, 22 L. J. Ex. 4; 7 Ex. 595.

the property was to revert to the plaintiffs, and that it was a question of fact whether the contract was a conditional one ; but the Court held that it was an absolute sale, and that there was no question for the jury. There seems to be no reason why parties should not agree to such a condition subsequent, but it must of course be proved.

In *Schuster v. McKellar (a)*, in 1857, the plaintiffs had about 100 tons of spelter lying in Hays' warehouse, which Coles and Co. were desirous of purchasing and shipping to Calcutta. A lighterman, instructed by Coles and Co., obtained from the plaintiffs a delivery order for the spelter on Hays, and gave the plaintiffs an acknowledgment that he had received the delivery order from them, and that he would hand them the mate's receipts. The mate's receipts acknowledged the spelter to have been received from the lighterman, and they were handed to the plaintiffs.

The usual course of business was for Coles and Co. to pay the plaintiffs for the goods, they then had the mate's receipts handed to them, which they attached to the bills of lading, and the bills of lading were then signed. But in this case Coles and Co. fraudulently procured bills of lading to be signed in their favour, and pledged them. The defendants, the shipowners, refused to deliver the spelter to the plaintiffs, but the Court held that the property had not passed, and upheld a verdict for the plaintiffs.

The case of *Sheridan v. The New Quay Co. (b)*, in 1858, was a very complicated one. It was an action by one who claimed to be a sub-buyer against a railway company for non-delivery. The facts appear to have been that the seller, Donaldson, took the bill of lading, making the goods deliverable to the buyer, and forwarded it to his bankers, together with a draft, to be delivered to the buyer on his acceptance and payment.

The bankers were unable to find the buyer, and therefore returned the bill of lading and draft. In the meantime the plaintiff, who had purchased the goods from the buyer, paid

(a) *Schuster v. McKellar*, 26 L. J. Q. B. 281 ; 7 E. & B. 704.

(b) *Sheridan v. The New Quay Co.*, 28 L. J. C. P. 58 ; 4 C. B. N. S. 618.

the freight, and employed the defendants, a railway company, to carry the goods for him. The Court held that the property had not passed, and that the defendants, in an action of trover, were not estopped from showing this.

In the following case of *Brown v. Hare* (a), in 1858, the consignors took the bill of lading in their own names, but the Court held that this had not been done for the purpose of retaining the property.

The defendants, who were merchants in Bristol, entered into a contract with the plaintiffs, who were merchants at Rotterdam, through a broker in Bristol, named Goolden, to purchase 20 tons of rape oil, of which 10 tons were to be shipped free on board at Rotterdam in September, to be paid for by a bill at three months, on delivery to the defendants of the bill of lading. On the 8th, the plaintiffs shipped 5 tons on board the *Sophie*, at Rotterdam, and the captain signed a bill of lading, making the oil deliverable "unto shippers' order or their assigns." The bill of lading was indorsed by the plaintiffs, "deliver the contents to the order of Messrs. Hare and Co.," and an invoice was made out stating the oil to have been shipped for account of Hare and Co.; and on the same day, the 8th, the plaintiffs sent by post to Goolden the bill of lading, an invoice, and a bill of exchange, drawn on the defendants, all of which Goolden received on the evening of the 10th after business hours. On the night of the 9th, the *Sophie* was lost in the Bristol Channel. On the morning of the 11th, Goolden, who knew of her loss, went to the defendants' office and there left the bill of lading, invoice, and bill of exchange. The defendants returned them shortly afterwards, saying they were not liable to pay for the oil. The Court held that the property had passed to the defendants, and that the plaintiffs were entitled to recover, and the judgment was affirmed in the Exchequer Chamber. Erle, J., delivering the judgment in that Chamber, said: "The real question has been on the intention with which the bill of lading was taken in this form: whether the consignor

(a) *Brown v. Hare*, 27 L. J. Ex. 372; 3 H. & N. 484; 29 L. J. Ex. 376; 4 H. & N. 822.

“shipped the goods in performance of his contract to place them ‘free on board’; or for the purpose of retaining a control over them and continuing to be owner contrary to the contract, as in the case of *Wait v. Baker* (a), and, as is explained in *Turner v. The Trustees of the Liverpool Docks* (b), and *Van Casteel v. Booker* (c). The question was one of fact, and must be taken to have been disposed of at the trial: the only question before the Court below or before us being, whether the mode of taking the bill of lading necessarily prevented the property from passing. In our opinion it did not, under the circumstances.”

In *Joyce v. Swan* (d), in 1864, M'Carter, of Londonderry, offered to buy 100 tons of guano from Seagrave and Co., of Liverpool, and Seagrave and Co. wrote to him on the 26th of February, saying they would send him 115 tons which they hoped to have on board the *Anne and Isabella* in a few days. On the 2nd of March, the plaintiff at M'Carter's request effected an insurance on the 115 tons. On the 3rd of March, M'Carter wrote a letter to Seagrave and Co., grumbling about the price. On the 4th of March, Seagrave and Co. took the bill of lading making the guano deliverable at Londonderry to their order or assigns, and made out an invoice as follows: “Particulars of phospho-guano delivered to account of W. M'Carter, Esq.” The bill of lading and invoice were sent to a partner in the house of Seagrave and Co., then staying at Belfast. On the evening of the 4th, but whether before or after posting the bill of lading the report does not say, Seagrave and Co. received M'Carter's grumbling letter, and, fearing lest he should refuse the guano, they insured it in their own names. On the 7th the partner in Belfast, who was going on a visit to M'Carter, took the bill of lading with him, and M'Carter said he would accept the cargo, and on the 9th, on getting back to business, the bill of lading was indorsed to him. It turned out afterwards that the *Anne*

(a) *Wait v. Baker*, 17 L. J. Ex. 307; 2 Ex. 1.

(b) *Turner v. Trustees of Liverpool Docks*, 20 L. J. Ex. 393; 6 Ex. 543.

(c) *Van Casteel v. Booker*, 18 L. J. Ex. 9; 2 Ex. 691.

(d) *Joyce v. Swan*, 17 C. B. N. S. 84.

and *Isabella* had been wrecked. The defendant contended that M'Carter had no insurable interest (a) in the guano, but the jury found that Seagrave and Co. had put it on board with the intention of passing the property to him, and found for the plaintiff. The Court refused to enter a nonsuit or to grant a new trial, Williams, J., saying, "It was a question for the jury, and I think they were warranted in assuming that the guano was put on board pursuant to that contract, with the intention of transferring the property from the sellers to the buyer. It is true that the bill of lading was taken in the names of the sellers, and at the time the insurance was declared was unindorsed. That was a circumstance which was well worthy the attention of the jury, and might have induced them to come to a contrary conclusion. But, if they thought that, notwithstanding this, there were other circumstances sufficiently cogent to induce them to come to the conclusion that the property was intended to pass, I am of opinion that the mere circumstance of the form of the bill of lading and of the invoice being transmitted to the partner then in Ireland, instead of to M'Carter direct, was not sufficient to annihilate the other evidence in the cause, though it might induce the jury to pause. The cases of *Wait v. Baker* (b), and *Brown v. Hare* (c), appear to me clearly to establish the distinction that, if from all the facts it may fairly be inferred that the bill of lading was taken in the name of the seller in order to retain dominion over the goods, that shows that there was no intention to pass the property; but if the whole of the circumstances lead to the conclusion that that was not the object, the form of the bill of lading has no influence on the result."

In *Moakes v. Nicholson* (d), in 1865, Pope, of London, having agreed to purchase coal from Josse at Hull, chartered a

(a) *Seagrave v. Union Marine Insurance Co.*, 35 L. J. C. P. 172; L. R. 1 C. P. 305.

(b) *Wait v. Baker*, 17 L. J. Ex. 307; 2 Ex. 1.

(c) *Brown v. Hare*, 27 L. J. Ex. 372; 3 H. & N. 484; 29 L. J. Ex. 376; 4 H. & N. 822.

(d) *Moakes v. Nicholson*, 34 L. J. C. P. 273; 19 C. B. N. S. 290.

ship and sent her to Hull. Josse put the coals on board, and wrote to Pope enclosing an invoice and an unstamped bill of lading, by which the cargo was made deliverable to Pope or order; Josse retained a stamped bill of lading, and sent another unstamped bill to his agent, the defendant, who obtained possession of the coal when the ship arrived in the Thames, on the ground that Pope had not paid cash according to contract. Pope appears to have sold the coals to the plaintiff before receipt of the unstamped bill of lading, which he subsequently indorsed and delivered to him. There was a dispute as to what were the terms of the contract, and it was left to the jury to say what they were, and the jury found that the contract was for cash against bill of lading, and that Josse did not intend to pass the property to Pope until cash had been paid (a). The Court held that the property had not passed to Pope, and that the plaintiff was in no better position than Pope. Erle, C. J., said: "The delivery of the coals on board a ship chartered by Pope has no effect whatever in passing the property. If the intention was that the ship should be regarded as the warehouse of Josse until the happening of the event contemplated, viz., the payment of the price, the putting the coals on board did not alter the position of the contracting parties" (b).

It is worth noticing that neither the terms of the contract nor the complete correspondence are given in the report, yet, as appears from the judgment of Erle, C. J., it was from these that the jury drew the conclusion that there was no intention to pass the property.

In *Ogg v. Shuter* (c), in 1875, the plaintiffs had contracted to purchase potatoes from one Loutr  in France to be delivered "free on board" at Dunkirk at a certain price. A payment of 30*l.* was made, and the potatoes were shipped on board the *Blonde* in sacks sent over by the plaintiffs, and a bill of

(a) This is so stated in the judgment of Erle, C. J.

(b) See *Falk v. Fletcher*, ante, p. 142; 34 L. J. C. P. 146; 18 C. B. N. S. 403.

(c) *Ogg v. Shuter*, 44 L. J. C. P. 161; 45 L. J. C. P. 44; L. R. 10 C. P. 159; L. R. 1 C. P. D. 47.

lading taken to order. Loutré indorsed the bill of lading to the defendant with instructions to exchange it for an acceptance for the balance. The plaintiffs had some reason to think that the quantity of potatoes shipped was 16 sacks short, and on this ground declined to accept for the full amount, but offered to do so if, when unloaded, it should appear that the full quantity had been loaded, or to accept at once for the full amount less the price of 16 sacks. The defendant declined, and sold the potatoes. The Court of Common Pleas held that the property had passed to the plaintiffs; but was reversed in the Court of Appeal, by Cairns, L. C., Kelly, C. B., Bramwell, B., and Blackburn, J. Cairns, L. C., delivering the judgment of the Court, said: "Where the shipper takes and keeps in his own or his agent's hands a bill of lading in this form to protect himself, this is effectual so far as to preserve to him a hold over the goods until the bill of lading is handed over on the conditions being fulfilled, or at least until the consignee is ready and willing and offers to fulfil these conditions, and demands the bill of lading. And we think that such a hold retained under the bill of lading is not merely a right to retain possession till those conditions are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so long at least as the vendee continues in default. It is not necessary in this case to consider what would be the effect of an offer by the plaintiffs to accept the draft and pay the money before the sale, for no such offer in this case was ever made" (a).

In *Gabarron v. Kreeft* (b), in 1875, the defendant had contracted to purchase from Munoz all the ore to be obtained from a certain mine within twelve months. Various vessels had been loaded by Munoz, and at the time when the *Trowbridge* arrived to take on board her cargo, payments had been made in advance, so that Munoz would not have been entitled to any further payment in respect of her cargo. Munoz had ore in stock which he ought to have shipped,

(a) See also *Shepherd v. Harrison*, 38 L. J. Q. B. 105 and 117, and *post*, p. 214.

(b) *Gabarron v. Kreeft*, 44 L. J. Ex. 238; L. R. 10 Ex. 274.

taking bills of lading to the defendant's order. But instead of doing this he picked a quarrel with them, and telegraphed to the defendants that he would not load the *Trowbridge* on their account. He then loaded her and took bills of lading making the shipment appear to be by one Sabadie, and making the cargo deliverable to Sabadie's order. Sabadie was a mere sham. The bill of lading was indorsed, and pledged with the plaintiff. The Court held that the property had not passed to the defendants.

In *Cahn v. Pockett's Bristol Channel Co. (a)*, in 1899, Steinmann and Co., of Liverpool, sold ten tons of copper, deliverable c.i.f., Rotterdam, to Pintscher, payment to be made by buyer's acceptance at thirty days from bill of lading date. The sellers forwarded to the buyer a bill of lading indorsed in blank together with a draft for his acceptance. Pintscher, who was insolvent, had previously sold the copper to the plaintiffs, and he handed the bill of lading to his bankers for delivery to the plaintiffs upon payment by them of the price of the copper, which was placed to the credit of his already overdrawn account. The bankers followed Pintscher's instructions, and the plaintiffs took the bill of lading in good faith and without notice of the rights of Steinmann and Co. The latter became aware of Pintscher's insolvency before the arrival of the copper at Rotterdam, and they accordingly stopped the goods *in transitu* on indemnifying the shipowners. Matthew, J. held that the property in the goods had not passed to Pintscher as by section 19 (3) of the Sale of Goods Act he was bound to return the bill of lading unless he had accepted the draft, and as he had not done so, the property in the goods had not passed to him.

In the case of *The South Australian Insurance Company v. Rundell (b)*, in 1869, the course of business was for farmers to bring their corn to the respondent's mill, where in the farmers' presence it was shot into large hutches, where it became mixed with corn brought by other farmers. The

(a) *Cahn v. Pockett's Bristol Channel Co.*, 67 L. J. Q. B. 625; [1898] 2 Q. B. 61.

(b) *The South Australian Insurance Co. v. Rundell*, L. R. 3 P. C. C. 101.

respondents gave a receipt for it, "Received, &c., to store," and could do what they liked with it. The farmer could at any time demand back an equal quantity of like quality, or the market price on the day of demand. The Privy Council held that the property passed to the millers, and approved of the law as stated by Sir W. Jones in his treatise on bailments, that wherever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of his identical subject-matter in its original or an altered form, this is a transfer of property for value—it is a sale, not a bailment.

In some cases the property may pass by action at law. Thus in *Cooper v. Shepherd (a)*, where the plaintiff sued Willomat in trover for the value of a bedstead and recovered it, and Willomat sold it to defendant, it was held that the defendant had a good title.

The two following cases show that where the intention to pass the property existed, the property passes notwithstanding that that intention was induced by a fraud. As Pollock, C. B., said, in delivering the judgment of the Exchequer Court in *Kingsford v. Merry (b)*, in 1856, "When a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor."

In *Attenborough v. St. Katherine's Dock Co. (c)*, in 1878,

(a) *Cooper v. Shepherd*, 15 L. J. C. P. 237; 3 C. B. 266; *Buckland v. Johnson*, 23 L. J. C. P. 204; 15 C. B. 145; overruled in *Brinsmead v. Harrison*, 40 L. J. C. P. 281; 6 C. P. 584.

(b) *Kingsford v. Merry*, 25 L. J. Ex. 166; 26 L. J. Ex. 83; 11 Ex. 579; 1 H. & N. 503.

(c) *Attenborough v. London and St. Katherine's Dock Co.*, 47 L. J. C. P. 763; L. R. 3 C. P. D. 373 and 450.

Lopez, who was a wine grower at Cadiz, consigned wine to Dolaro in London, and sent the bills of lading to his agent, Speller. Speller was induced by fraud to sell the wine, and handed the bills of lading to Dolaro. The wine was entered by Dolaro at the Custom House, and placed by the defendants in their bonded vaults. The defendants issued warrants making the wine deliverable to Dolaro or assigns, and Dolaro pledged them with the plaintiffs. Subsequently Lopez gave notice to the defendants not to part with the wine on the ground that it had been obtained from him by fraud. The Court held that there was a complete contract of sale passing the property in the wine to Dolaro, although it had been induced by fraud; and that although upon discovering the fraud Lopez might have disavowed the contract, yet before he did so the plaintiffs had obtained a good equitable title to the goods.

In *Babcock v. Lawson* (a), in 1880, the plaintiffs had lent Denis Daly and Sons their acceptances for a large sum of money, on the security of certain flour which Denis Daly and Sons warehoused in the plaintiffs' name. Daly and Sons then applied to the defendants for an advance on the security of the same flour, but without letting them know of their agreement with the plaintiffs. The defendants in good faith agreed to make the advance if the flour was warehoused in their name with absolute possession and power to sell. In order to carry out this fraudulent scheme Daly and Sons represented to the plaintiffs that they had sold the flour to the defendants, who would pay for it on delivery, and would pay the proceeds of the sale to them when received. Thereupon the plaintiffs gave Daly and Sons a delivery order, and directed the warehouseman to transfer the room in which the flour was deposited to Lawson and Co., and this was accordingly done. It was held in the Queen's Bench, and affirmed in the Court of Appeal, that the plaintiffs had passed the special property in the

(a) *Babcock v. Lawson*, 48 L. J. Q. B. 524; 4 Q. B. D. 394; 49 L. J. Q. B. 408; 5 Q. B. D. 284.

goods, which they had as pledgees, to the pledgors Daly and Sons, and could not recover (a).

It may be well here to advert to the distinction between those cases where there was in fact a contract of sale, and those cases where there was an intention to contract, but no contract was in fact entered into, either in consequence of a misunderstanding as to the thing sold, or as to the person with whom the contract was made.

An early case of this class is the one to be found in Pothier's work on the Law of Sales, as being related by Plutarch in his "Life of Solon": "Some Milesians, being at the island of Chios, purchased of some fishermen there, the casting of their net. The fishermen drew up a golden tripod, and the buyers laid claim to it. In this case the claim was not well founded, for they did not intend to buy, nor did the sellers intend to sell, anything except the fish which might be taken."

In *Thornton v. Kempster* (b), in 1814, the plaintiff wished to sell Petersburg clean hemp, and the defendant to buy Riga Rhine hemp; it was held there was no contract. And in *Phillips v. Bistolli* (c), in 1824, the defendant made a bid at an auction and had the goods knocked down to him. They were handed to him, but on finding he had made a mistake as to the price, he immediately returned them. It was held to be a question of fact whether there had been such an acceptance as to make the contract good. In the case of *Raffles v. Wichelhaus* (d), in 1864, the contract was again a broker's, in which the seller sold cotton "to arrive *ex Peerless* from Bombay," which ship sailed from Bombay in December. The defendant admitted that he intended to buy cotton *ex* a ship called *Peerless* but it was a different ship which sailed in October. Held, no contract.

(a) See also *Parker v. Patrick*, in 1793, 5 T. R. 175; *Henderson v. Williams*, 64 L. J. Q. B. 308; [1895] 1 Q. B. 521; and *Farquharson v. King*, 70 L. J. K. B. 985; [1902] A. C. 325; and section 58 of the Sale of Goods Act (Sales by Auction).

(b) *Thornton v. Kempster*, 5 Taunt. 786, *ante*, p. 99.

(c) *Phillips v. Bistolli*, 2 B. & C. 511.

(d) *Raffles v. Wichelhaus*, 33 L. J. Ex. 160; 2 H. & C. 906.

In *Smith v. Hughes* (a), in 1871, the defendant refused to accept and pay the plaintiff for oats, saying that he had intended to purchase old oats, and new ones had been tendered. There was a difference as to what had been said at the time of the sale as to the age. One question left to the jury was whether at the time of contracting, the plaintiff had believed the defendant to be under the impression he was buying old oats. But in the motion for a new trial the majority of the Court was of opinion that the point whether there was a contract or not depended not on the self-deception of the buyer, but on whether the defendant bought them under the belief that they were warranted old.

Cockburn, C. J., said : “ Suppose a person to buy a horse “ without a warranty, believing him to be sound, could it be “ contended that it would be open to him to say that, as he “ had intended to buy a sound horse, and the seller to sell an “ unsound one, the contract was void, because the seller must “ have known from the price the buyer was willing to give, “ or from his general habits as a buyer of horses, that he “ thought the horse was sound ? ” And Blackburn, J., said : “ I agree that even if the vendor was aware that the purchaser “ thought that the article possessed that quality (age), and “ would not have entered into the contract unless he had so “ thought, still the purchaser is bound, unless the vendor was “ guilty of some fraud or deceit upon him, and that a mere “ abstinence from disabusing the purchaser of that impression “ is not fraud or deceit ; for, whatever may be the case in a “ court of morals, there is no legal obligation on the vendor “ to inform the purchaser that he is under a mistake, “ not induced by the act of the vendor. . . . But I “ doubt whether the direction (of the County Court Judge) “ would bring to the minds of the jury the distinction between “ agreeing to take the oats under the belief that they were “ old, and agreeing to take the oats under the belief that the “ plaintiff contracted that they were old. The difference is “ the same as that between buying a horse believed to be “ sound, and buying one believed to be warranted sound.”

(a) *Smith v. Hughes*, 40 L. J. Q. B. 221 ; L. R. 6 Q. B. 597.

In *Hardman v. Booth* (a), in 1863, one of the plaintiffs, who were worsted manufacturers, called with Keighly, the London agent of his firm, at the offices in Upper Thames Street, of Gandell and Co., whom they knew as an old-established firm, but by reputation only. Thomas Gandell was the only partner in it, but he was unwell, and they interviewed Edward Gandell, a son of Thomas, who managed the business. The goods in question were ordered by Edward Gandell. The first lot was sent to Upper Thames Street, and the second lot was taken away in a cart belonging to Gandell and Co. The plaintiffs drew on Thomas Gandell and Co., but at the request of Edward Gandell, the name was altered to Edward.

The invoices were headed, "Edward Gandell and Co., "Upper Thames Street." The goods were pledged by Edward Gandell with the defendant. Edward Gandell became bankrupt. The Court held the plaintiffs had intended to contract with Gandell and Co. and not with Edward Gandell, to whom there had been no intention to pass the property (b).

In the case of *Hollins v. Fowler* (c), in 1874, the point decided was whether there had been a conversion or not under these circumstances: Bayley, a cotton broker, represented that he was purchasing cotton for Seddon, and Fowlers believing they were selling to Seddon, delivered to Bayley as Seddon's broker thirteen bales of cotton. Bayley then sold and delivered the cotton to Hollins, who resold and delivered it to Micholls. It does not seem to have been argued that the property had passed from Fowlers, and Blackburn, J., said (d), that both the property and the right to the possession remained in them.

In *Cundy v. Lindsay* (e), decided in the House of Lords in

(a) *Hardman v. Booth*, 32 L. J. Ex. 105; 1 H. & C. 803.

(b) See also *In re Reed, Ex parte Barnett*, in 1876, 45 L. J. Bank. 120; 3 Ch. D. 123.

(c) *Hollins v. Fowler*, 41 L. J. Q. B. 277; 44 L. J. Q. B. 169; L. R. 7 Q. B. 616; 7 E. & I. App. 757.

(d) 44 L. J. Q. B. 172; 7 E. & I. App. 763.

(e) *Cundy v. Lindsay*, 45 L. J. Q. B. 381; 46 L. J. Q. B. 233; 47 L. J. Q. B. 481; 1 Q. B. D. 348; 2 Q. B. D. 96; 3 App. Ca. 459. See also *Mitchell v. Lepage*, in 1816, Holt, N. P. 253; *Boulton v. Jones*, 27 L. J. Ex. 117; 2 H. & N. 564; *Loeschman v. Machin*, in 1818, 2 Stark. N. P. C. 311.

1878, Lindsay and Co. were linen manufacturers at Belfast. A man named Blenkarn, who had hired a room at 37, Wood Street, London, wrote to them about purchasing some goods of their make, and signed his name in such a way as to appear like Blenkiron and Co. There was a highly respectable firm of W. Blenkiron and Son, who carried on business at 123, Wood Street, London. Lindsay and Co., who knew this firm by name and believed themselves to be dealing with them, sent the goods and invoices addressed to Messrs. Blenkiron and Co., 37, Wood Street, Cheapside, where they were received by Blenkarn. Blenkarn then sold the goods thus fraudulently obtained to Messrs. Cundy, who were *bonâ fide* purchasers, and who resold them in the course of their trade. Blenkarn was convicted and sentenced, and this action was brought by Lindsay for the unlawful conversion. Cairns, L. C., delivering judgment, said (a): "With regard to the
"title to personal property, the settled and well known rules
"of law may, I take it, be thus expressed: by the law of
"our country the purchaser of a chattel takes the chattel
"as a general rule, subject to what may turn out to be certain
"infirmities in the title. If he purchases the chattel in
"market overt he obtains a title which is good against all
"the world, but if he does not purchase the chattel in
"market overt, and if it turns out that the chattel has been
"found by the person who professed to sell it, the purchaser
"will not obtain a title good as against the real owner. If
"it turns out that the chattel has been stolen by the person
"who has professed to sell it, the purchaser will not obtain
"a title. If it turns out that the chattel has come into the
"hands of the person who professed to sell it, by a *de facto*
"contract, that is to say, a contract which has purported to
"pass the property to him from the owner of the property,
"there the purchaser will obtain a good title, even although
"afterwards it should appear that there were circumstances
"connected with that contract which would enable the original owner of the goods to reduce it and to set it aside,
"because these circumstances so enabling the original owner

(a) 47 L. J. Q. B. 483; 3 App. Ca. 463.

“ of the goods, or of the chattel, to reduce the contract and
“ to set it aside will not be allowed to interfere with a title
“ for valuable consideration obtained by some third party
“ during the interval while the contract remained unreduced.”
The House held that there had been no intention on the part
of Lindsay and Co. to pass the property to Blenkarn, and
therefore Messrs. Cundy had no title to the goods (*a*).

With this case may be contrasted those cases where an
agent “ entrusted ” gave a good title by virtue of the Factors
Acts (*b*).

To the general rule that a person cannot give a better title
than he has there are a few exceptions.

A person having a gold coin or a bank note in his possession, to which he has no title whatever, may give a good title to it to a stranger. The law on these exceptions will be found in the notes to *Miller v. Race*, in Smith's Leading Cases.

In the case of purchases made in market overt, according to the usage of the market, the buyer acquires a good title provided he buys in good faith and without notice of any defect or want of title on the part of the seller (*c*). Similarly, when the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title provided he buys them in good faith and without notice of the seller's defect of title (*d*). In the case of sales of stolen goods in market overt the buyer acquires a good title until the conviction of the thief; but in cases where goods have been obtained by wrongful means not amounting to larceny, the property in the goods does not revert in the rightful owner by reason only of such conviction (*e*).

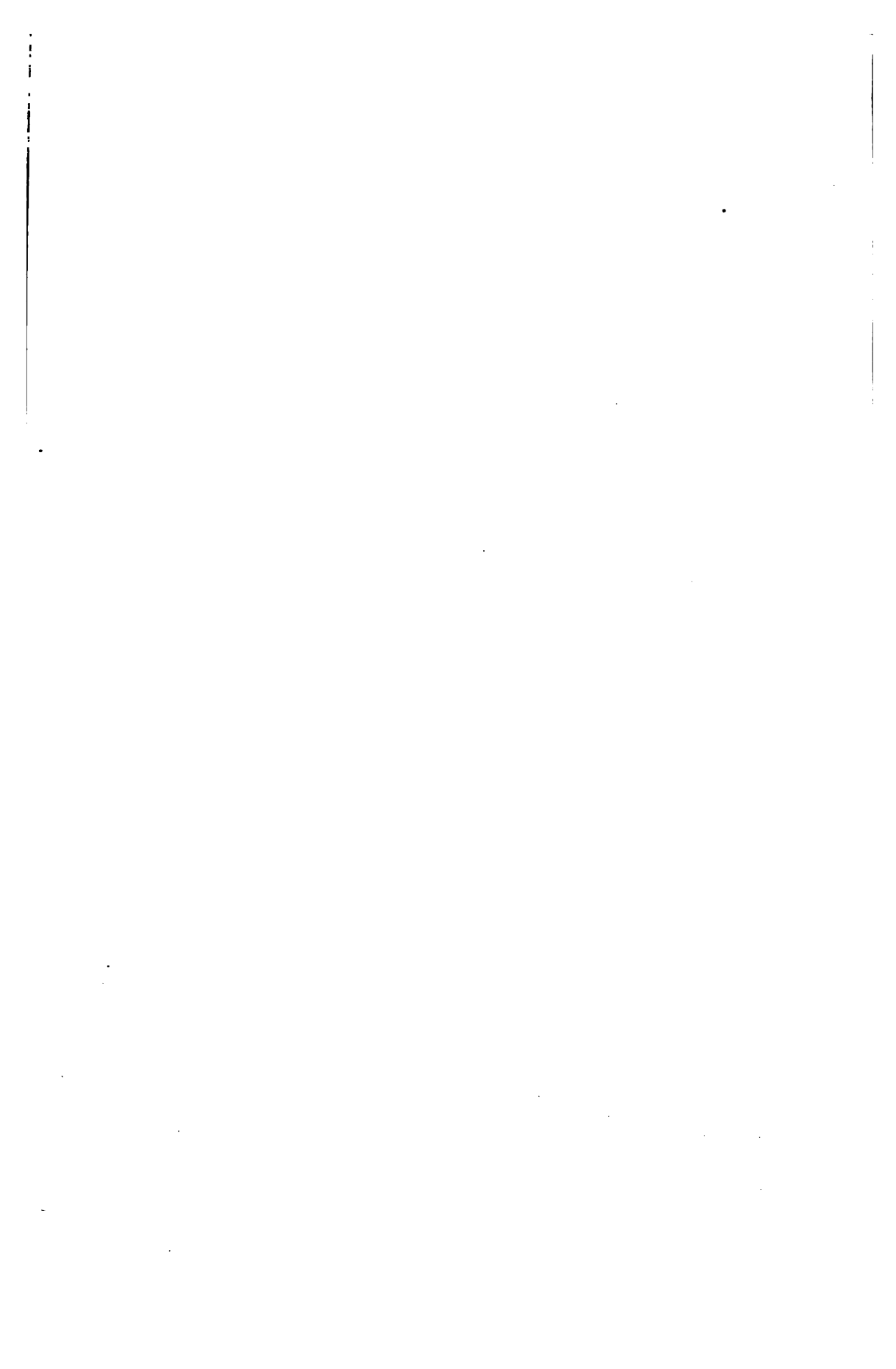
(*a*) See also *Higsons v. Burton*, in 1857, 26 L. J. Ex. 342; and *Cooper v. Willomatt*, in 1845, 14 L. J. C. P. 219; 1 C. B. 672; Sale of Goods Act, 1893, s. 23.

(*b*) *Baines v. Swainson*, 32 L. J. Q. B. 281; 4 B. & S. 270; *Heyman v. Flewker*, 32 L. J. C. P. 132; 13 C. B. N. S. 519; *Cole v. North Western Bank*, 43 L. J. C. P. 194; 44 L. J. C. P. 233; L. R. 9 C. P. 470; L. R. 10 C. P. 354; *Vickers v. Hertz*, L. R. 2 Sc. Ap. 113; *Johnson v. Credit Lyonnais*, 44 L. J. C. P. 241; L. R. 2 C. P. D. 224; L. R. 3 C. P. D. 32. See *post*, p. 465.

(*c*) Sale of Goods Act, 1893, s. 22.

(*d*) *Ibid.*, s. 23.

(*e*) *Ibid.*, s. 24.



When the property passes. The precise point of time at which property in unspecified goods passes to the purchaser, so as to be at his risk, is often a matter very difficult to determine. In *Coleman v. McDermot*, 5 U. C. C. P. 303, the facts were that defendants contracted for a sale to the plaintiff, to be delivered at Port Hope on the first of June, of 2,000 barrels of flour of a specified description, f.o.b., terms cash on delivery or on warehouse receipt. The flour was not delivered on the first of June, but was deposited in Hackett's warehouse at Port Hope before and on the sixth of June. On that day a written order was given to the plaintiff, addressed to the warehouse keeper, requesting him to deliver to defendants at Port Hope 1,000 barrels of flour, description as in contract, across the face of which plaintiff wrote an order making the flour deliverable to the broker acting in the transaction, who endorsed it in blank. On the 11th of June, the broker telegraphed to defendants, "Money goes to-morrow. Was ready first "June." On the 12th June, the broker enclosed £2,125 to the defendants, being the last payment on account of flour purchased. The flour was burned on the preceding day, and on the 16th of June defendants were notified of Hackett's refusal to accept the order for the flour. It was proved that the plaintiffs had been hesitating on the 8th and 9th of June to accept the flour, the day for delivery having passed, but on the morning of the 12th the plaintiffs paid the money and received the order of 6th of June for the flour, which order had not been accepted by Hackett. It was held that a specific 1,000 barrels of flour of the specified description having been deposited in the warehouse at Port Hope and appropriated to the plaintiffs, and the plaintiffs having paid the price thereof and accepted the delivery order, the right of property had passed to them and the property was at their risk.

"Although no specific property passed by the original "broker's contract of sale, I think it did pass when a "specific quantity was warehoused, appropriated to and "paid for by the vendees. In expressing this opinion, I "of course infer that a specific 1,000 barrels of flour had "been so appropriated and paid for. *That* fact seems to "have been considered as established at the trial, and

“ forms a material one in a case of this kind. There was
“ express evidence on that point, and the jury were evidently
“ satisfied of the fact, though not seemingly made a
“ distinct question in the various points submitted to the
“ jury. Without, therefore, considering whether there was
“ sufficient proof of the actual delivery and receipt in fact
“ of fifteen barrels of flour as part of and on account of the
“ flour mentioned in the delivery order, which I am not
“ prepared to say there was, it appears to me that if the
“ flour in question was a distinct identified lot of 1,000
“ barrels deposited in Hackett's warehouse, previously
“ owned by defendants, and by them appropriated to the
“ plaintiffs in fulfilment of their contract, the right of
“ property passed to the plaintiffs upon payment by them
“ of the price, and the receipt by them of the delivery order,
“ and that it remained thenceforward at their risk, notwithstanding
“ that term of the contract of sale which bound the
“ defendants to deliver it f.o.b., or free on board; consequently
“ that the rule should be made absolute for a new
“ trial without costs.

“ I do not think it depends upon whether Hackett had
“ previously accepted the order or held the flour, prepared
“ to deliver it to the defendants at the time they transferred
“ the delivery order to the plaintiffs. There is no evidence
“ of his actually having been apprised of such transfer
“ until after the loss, but in my opinion he had no discretion
“ in the premises; so far as I can see, he was bound
“ to deliver it to the owner upon request and payment of
“ his lawful charges, and the plaintiffs had become owners
“ by the contract of sale, appropriation and payment, if, as
“ I assume, it was Cluxton's flour originally, and had been
“ sold by him to the defendants, and by them to the plaintiffs,
“ without any right to control the delivery by the
“ warehouseman to the plaintiffs under the delivery order.
“ That the defendants owned the flour as vendees of
“ Cluxton was not disputed at the trial.”

Goods sold out of larger bulk—no property passes before separation. It is obvious that property to be selected from a larger bulk cannot pass until, by selection, it is determined what property is to be the subject of the sale. Thus, in *Ross v. Hurteau*, 18 S.C.R. 713 Cameron Sup. Ct. Cases 511.

the respondent had purchased four millions of lumber which was lying in Edwards' lumber yard at Rockland. Of this he agreed to sell a portion—about a million and a half—to one Little on a six months' credit, and he gave Little a delivery order on Edwards, which the latter accepted. Little then pledged the same lumber to Ross as security for an advance, and gave him a delivery order on Edwards, which was accepted. Before all the lumber had been delivered, Little made a default in payment, and Hurteau forbade delivery of the remaining lumber, asserting an unpaid vendor's lien. The Ontario Court of Appeal held that the property had not passed out of Hurteau, because it had never been separated from the bulk, and there was therefore no property of Little's on which the warehouse receipt could operate. "It may or may not operate as an estoppel upon Edwards; but how can that affect the original owners, who have never given anything but a delivery order, which has not been fully acted upon?" The Supreme Court of Canada upheld this view, not solely, however, on the ground that the goods had not been separated from the bulk. There were several other circumstances in the case from which Sir W. J. Ritchie, C.J., inferred an intention on the part of Hurteau not to part with his lien. Strong, J., and Gwynne, J., dissented, the former stating no reasons.

Patterson, J., held that the acceptance of the order by Edwards & Co. did not make them bailees for Little or Ross by attornment in respect of the property, and that the rights of Hurteau were the same as those of an unpaid vendor to stop goods *in transitu*. Gwynne, J., held that Hurteau was estopped by his conduct in the transaction from asserting title in the lumber which Edwards & Co. had undertaken, on the strength of the authority from Hurteau, to hold for Ross. It will be seen that in the judgment of the majority of the court this case emphasizes the doctrine that there can be no transfer of property from one to another until separation from the bulk, which is the general principle, although Ritchie, C.J., said he was not prepared to dispute that the property may be changed though acts necessary to put the goods in a deliverable state remain to be done, and in such

a case he thought the intention that the property should pass before delivery should be clearly established so as to interfere with the right of an unpaid vendor.

In *Haverson v. Smith*, 16 Man. 204, Burnett agreed to deliver free on board cars at Carmen 195 cords of wood in exchange for four mules. It was agreed that if the wood should be burned defendant would bear the loss, and if the mules died that Burnett should bear the loss. The wood had to be selected from two piles containing in the whole 200 cords. Before anything was done to separate the wood Burnett assigned to plaintiff for the benefit of creditors. It was said, in the course of the judgment, that the agreement that if the wood was burned the defendant should bear the loss would corroborate the theory that the property passed to the defendant because of the principle *res perit domino*. "But where the undisputed evidence shows that "there was no change of property the agreement to bear "the loss by fire was unimportant; it merely meant that "in case the piles should be destroyed by fire Burnett "would be relieved from his liability to deliver the wood."

In *Box v. Provincial Insurance Company*, 18 Grant's Ch. 280 (1871), a warehouseman sold 3,500 bushels of wheat, part of a larger bulk which he had in store, and gave the purchaser a warehouseman's receipt acknowledging, not according to the facts, that he had received from him that quantity of wheat, to be delivered pursuant to his order, to be endorsed on the receipt. The 3,500 bushels were never separated from the bulk. The majority of the court held that the plaintiff had an insurable interest, Spragge, C., Morrison and Gwynne, JJ., dissenting. The case cannot, under the circumstances, be of very high authority. It does not determine that any property passed in the wheat sold before separation; but the majority held that whether the property passed or not the plaintiff had an insurable interest. Spragge, C., dissenting, held that no property had passed, and that plaintiff had not an insurable interest, because he was not the owner. He also held that even if he could insure, not being the owner, he could not recover on his policy, having misdescribed his interest.

Goods made for another, but warehoused as goods of maker, and warehouse receipt transferred. In *Gowans et*

al. v. Consolidated Bank of Upper Canada, 43 U. C. Q. B. 318, the plaintiff ordered from the Huntington Glass Company a quantity of glass chimneys, which were to be stored by the company and shipped according to the directions of the plaintiffs, the company paying for the storage. The company from time to time invoiced the packages as made to the plaintiffs, and drew for the price. According to the letters sent by the company to the plaintiff, they were stored for the plaintiffs and at their risk, but in fact they were not so stored. The warehouseman received them as the goods of the company, and the greater part of the warehouse receipts were transferred to the defendants as security for negotiable paper. A verdict for the defendants was sustained under the circumstances. The court, Harrison, C.J., after citing a number of cases, of which *Atkinson v. Bell* is the type, and *Mucklow v. Mangles*, the extreme application, said: "The reading of these cases satisfies us" "that in order to the passing of property, either manufac-" "tured to order or bought from a larger quantity of the" "same class of goods, there must, as a general rule, not" "only be an appropriation on the part of the seller, but an" "assent to the appropriation on the part of the purchaser."

Timber ordered from miller, sawed and piled, but no assent to appropriation. In one of the cases above mentioned, the learned Chief Justice Harrison refers to *Pew v. Lawrence*, 27 U. C. C. P. 402 (1877), as having been decided in the same way as the one then before the court. In this case the order was for a quantity of lumber, to be got out and sawed for the defendant, to be delivered as early in May as possible. It was not all cut till the 5th of June. On the 12th of June it was destroyed by fire. There was conflicting evidence as to a statement that on the 20th of May the defendant promised to go up in two weeks and accept the lumber, and it appeared that 9,000 feet was placed in a pile by itself for the defendant, but the rest was not separated from other lumber that was being sawed at the same time. It was held that the property had not passed, there being no delivery and acceptance.

Assent of purchaser to sale not presumed, even where result is to prefer creditor. In *Barrett v. Rapalye*, 4 O. S. 175 (5 Wm. 4), a debtor set aside goods by way of sale to

a creditor in order to prefer the creditor, but there was no assent on the part of the creditor or by anyone authorized by the creditor to assent. The goods were seized by the sheriff under attachment. Robinson, C.J., said: " Had it
" been a gift—a mere matter of bounty—not interfering
" with the rights of third persons, or had the goods been
" conveyed to trustees by Beach to sell and pay the proceeds in money to any one or more creditors, it would have
" been good, though the creditor in whose favor the trust
" was created knew nothing of the act at the time. The
" reason is good; no person, it is supposed, will ever dis-
" affirm an act which must be for his benefit, by which he
" must gain something and can lose nothing; but here it
" cannot be taken for granted that Barrett stood ready at
" any time to take Beach's stock of goods at his own price
" and discharge him of so much of his debt. If he had been
" otherwise secured, for instance, or was satisfied Beach
" could be made to pay, it would be folly. I think this
" distinction is plainly drawn by the court in the celebrated
" case of *Taylor ex dem., Atkyns v. Hood*, in which the case
" of *Thompson v. Leach* is remarked upon. Such a transfer,
" as this is not complete at once, subject to be defeated by
" dissent. It requires confirmation; and I take it to be a
" settled principle that ' a confirmation shall not have rela-
" ' tion to the prejudice of another,' and certainly not so as
" to make the sheriff a trespasser. The sheriff could not
" tell whether Barrett would assent or not, and in my opin-
" ion he had a right to act on the facts as they stood, if the
" sale was not then absolute and perfect, and could not be
" made a trespasser by any election to be declared after-
" wards."

Sale distinguished from consignment for sale. A case occurs in the Supreme Court reports, in which the question to be decided was whether the transaction was a sale of goods or a supply of goods to be sold as those of the party so supplying. The defendant agreed with one West and his wife that the latter should furnish free of rent and taxes a store at Innisfall suitable for carrying on business as a general merchant; that defendant would supply to them all such goods and stock in trade as were usually necessary in such a business, and replenish such stock as occasion

should require and defendant should deem expedient; that West should devote his whole time to the business, etc.; that West and his wife should make a report to defendant of the sales made and cash balances once in each month, and render to defendant a general account of the stock-in-trade, credits, property and effects, debts and liabilities of the said business once every three months; that the said West and his wife should remit to defendant all monies received by them from sales in the course of business, deducting freight charges and such amounts as might be paid out for local merchandise and farm produce; that defendant might from time to time and at all times visit the store and examine the books of account, etc., etc.; that the net profits should be divided, and defendant might determine the agency at any time. Gwynne, J., said it was apparent from the agreement that the parties did not contemplate a sale of the goods by defendant. There was no provision that West or his wife should pay defendant anything as the price of the goods. The goods so supplied could not therefore be seized under execution, as the goods of West and his wife. *Ames-Holden Company et al. v. Hatfield*, 29 S. C. R. 95.

A manufacturing furrier, by agreement with a retail dealer, placed a quantity of furs with the dealer, who could sell them as he pleased, paying therefor within twenty-four hours after each sale, according to a price list supplied by the furrier, who had a right to withdraw from the dealer any quantity he chose, at any time he pleased, the goods remaining unsold at the end of the season to be returned to the furrier. While in possession of the goods under this agreement the dealer made an assignment, and the goods were claimed by the assignee. It was held that the property in the unsold goods had never passed and that the transaction did not come within the provision of the Ontario Statute, 1897, ch. 148, Sec. 41, p. 402, "that in case of an agreement for sale
" or transfer of merchandise of any kind to a trader, or
" other person, for the purpose of re-sale by him in the
" course of business, and the possession pass to such
" trader, or other person, but not the absolute ownership,
" until certain payments are made, or other circumstances
" are satisfied, any such provision as to ownership shall as

“ against creditors, mortgagees or purchasers be void and the sale or transfer shall be deemed to have been absolute.” The Chief Justice considered that these goods could not be said to have been intended for a re-sale by the dealer. The word “ resale ” would import in this case, if appellant’s contention prevailed, that the defendant had sold them; but he never did, neither was there any agreement for a sale by the defendant to the dealer of goods to be resold by him. There was to be no sale at all by the defendant to the dealer at any time, where the dealer sold the goods to third parties in the course of his business. When the dealer sold, it was not his title to the ownership of the goods that passed to the purchasers. *Langley v Kahnert*, 36 S. C. R., 397.

Construction of contract from letters. In *Acme Silver Co. v. Peret*, 4th Man. 501, defendant ordered certain goods through the plaintiffs’ traveller. The plaintiffs on the 12th of December wrote defendant that they would consign only, not sell. The letter was never received, but defendant did receive a telegram as follows: “ Can only fill order forty off hardware, forty and ten flat ware. You pay express. Answer if satisfactory.” Defendant replied, “ All right; send goods at once.” On the 16th the goods were shipped. On the same day plaintiffs wrote defendant that the goods were consigned only and not sold, but this letter was not mailed until the 18th, and was not received until after the goods had been received and accepted. The invoice was headed “ Consigned ” to the defendant. Held a complete sale, and that the property vested in the defendant.

Sale with right to repurchase distinguished from mortgage. In *Moore v. Sibbold*, 29 U. C. Q. B. 487 (1869), the question arose as to a transfer of a horse, whether the defendant, who had taken the transfer of the horse from the plaintiff, with an agreement to return it on payment of a stipulated amount, with interest, was really a purchaser with an obligation to re-sell, or a mortgagee for the amount advanced the plaintiff under an obligation therefore to account for the surplus. In respect to analogous real estate transactions, it has been pointed out that while it is generally to the advantage of the transferror to have the transaction considered as a mortgage, it is not always so.

If the property is not worth the amount advanced, having depreciated in value, or too large an amount having been advanced, it is to the advantage of the transferee to have the transaction construed as a mortgage. The fact that it is a mortgage implies the existence of a debt due from the transferor which the transferee can recover to such amount as may not be realized from the property, whereas if it is a sale with a right to repurchase, there is no obligation to repurchase, and the transferor is quit of his liability. Various criteria have been made use of for the purpose of determining whether the transaction is a sale with the right to repurchase, or a mortgage, one of which may be mentioned here, because it existed in the case referred to. If the transferor agrees to pay interest, *as interest*, and not merely as rent, where he continues after the transaction in possession of the property, that is considered as a reason for considering the transaction a mortgage rather than a sale. Agreement to pay interest implies existence of a debt, and there is no debt due from the transferor where the transaction was a sale. In the case cited, the defendant entered into an agreement, the essential elements of which were as follows: I, D. W. Sibbold (the defendant) give twenty dollars to Joseph O. Moore (the plaintiff) for the colt which I have in possession, but I promise to give back the colt to Moore if he will pay the same sum, with twelve per cent. interest, on or before the first day of May, 1866. If not paid, the colt will be D. W. Sibbold's property, then he can do with it as he likes, or keep it for himself. The Court of Queen's Bench held that this was a sale of the colt to Sibbold, with an obligation to hand it back on payment of the amount stipulated on the day named. The plaintiff was not obliged to repurchase, nor would he be obliged to make good any deficiency on a re-sale by the defendant. He did not owe the defendant any money, as he would have, if the transaction had been a mortgage. The case is reasoned by Wilson, J., on the analogy of the cases respecting real estate, which are cited; but there are two criteria present which, if the case related to real property, would have made for the contention that the transaction was a mortgage. The great discrepancy between the amount advanced and the actual value of the property was one,

and the stipulation for the payment of interest was another. But the court held it a sale on a strict reading of the agreement. "When the defendant says by the writing, 'I give \$20 to Moore for the colt I have in my possession,' that is a purchase. When he says, 'but I promise to give back the colt to Moore if he will pay the same, with 12 per cent. interest, on or before the first day of May, 1866,' that is a contract of re-sale to Moore upon these terms. If the agreement had ended there, there would have been hardly any doubt that the contract was one of such a nature. But, it is added, 'If not paid, the colt will be D. W. Sibbold's property, then he can do with it as he likes, or keep it for himself.' I think the meaning of the clause is that if Moore do not pay the money by the day, his right to buy shall be determined, and Sibbold may do as he pleases without regard to the right which he has given to Moore. Sibbold could not oblige Moore to buy, nor could he sue him for the price, or any balance that might be unpaid. And after the day, Sibbold might have kept the colt 'for himself,' and the plaintiff could neither redeem him nor compel him to account for the surplus."

Goods manufactured according to contract, acceptance refused. No property passes. The defendant was a cooper and had been making whiskey barrels for the plaintiffs, a firm of distillers. They supplied him from time to time with money to purchase material, and on one occasion instructed him to sell no barrels to anybody else, as they would require all his output. He thereafter confined his sales to them, and produced a quantity of barrels for them which they declined to accept, having tested a sample lot and considered them unsatisfactory. On an action for the money advanced, the defendant sought to set off the value of the barrels so manufactured as goods bargained and sold, and the jury allowed the set-off, finding that the barrels were well made, which was the principal question in controversy. The court held, however, that the value of the barrels could not be set off. The property had not passed. There had been no acceptance, and the defendants' only remedy, assuming the efficiency of the barrels, was an action for not accepting. The judgment of the court, per Richards, J., cites, rightly enough, the case of *Atkinson v.*

Bell to show that there must be an appropriation by the vendor, assented to by the vendee, though that case is not now a good authority as to what constitutes such assent, the comments of Mr. Benjamin having greatly impaired, if not destroyed its authority. (See Benjamin on Sales, 5th Ed., 360). The other cases, *Grafton v. Armitage*, 8 B & C. 277. and *Clay v. Yates*, do not seem to be appropriately cited. They relate to a distinction between goods sold and work and labor done, not to the case where the contract is clearly one for goods, wares and merchandise, and the question relates solely to the passing or non-passing of the property. The case seems well decided on this point. Defendants' remedy was clearly an action for refusal to accept the goods made for him, but the property in which did not pass for want of assent to the appropriation. *Gooderham v. Dash*, 9 U. C. C. P. 413.

Quebec case as to passing of property on contract for outfit of mill and logs on which advances made by purchaser. In *King v. Dupuis*, 28 S.C.R. 388, a contract was made for the output of a sawmill, consisting of "all the "lumber" that the mill-owner should saw "at his mill "during the season," to be paid for at prices stated. The agreement also provided that the purchasers should advance money upon the sale of the lumber on condition that the seller should, at the option of the purchasers, furnish collateral security on his property, including the mill and machinery belonging to him, etc., the advances being made on the culler's certificates showing receipts of logs not exceeding \$25 per hundred logs of fourteen inches standard; "that all logs paid for by the purchasers should be "their property and should be stamped with their name. "and that all advances should bear interest at seven per "cent." Before the river driving commenced, the logs were culled and stamped with their usual mark, and they paid for them a total sum averaging \$32.33 per hundred. Some of the logs also bore the seller's mark, and a small quantity, which were buried in snow and ice, were not stamped, but were received on behalf of the purchasers along with the others. The logs were then allowed to remain in the actual possession of the seller. The property having been seized in execution against the

seller, the question was whether the property had passed to the purchaser.

With respect to the contract as to the deals, and the property therein, as determined by the terms of the contract, Girouard, J., stated the question to be whether the sale was a sale of something determinate within the meaning of Article 1026 of the Civil Code, or a sale of numerable things by weight or measure, and not in the lump, contemplated by Article 1476. He declined to pronounce upon the delicate question so presented, preferring to base the judgment of the court upon that part of the contract which dealt with the logs. These he considered had been sold: "The ownership is presumed from the mere stamping of the logs unless the contrary be proved; in this case the presumption is supplemented by oral evidence that a transfer of property was really intended. But there is more. The proof of the sale appears upon the face of the written agreement. It is therein stipulated that all logs paid for by the purchasers shall be their property, and shall be received and stamped with their name. The price is mentioned—\$25 for each 100 logs of 14 inches standard, which, and more, has been paid by the appellants to Taschereau." As to the contention that the term, "advances" implied a pledge and not a sale, the reply was that the term "advances" meant throughout the contract, not a loan of money, but a payment in advance on the price of the deals to be delivered, the contract saying, in precise terms, "the purchasers shall advance on the price of the deals on the following conditions, etc." The logs being the property of the purchaser, the necessary consequence was that the deals and boards into which they were manufactured were their property.

Quebec case—Moveable property becoming immoveable by destination. In *La Banque de Hochelaga v. Waterous Engine Works Co.*, 27 S.C.R. 406 (1897), elsewhere cited in the notes on a question as to the validity of a suspensive condition reserving the property in the vendor until payment, the question arose also as to the effect of the incorporation of the moveables in real estate. The machinery was sold to the respondent company, under an agreement reserving the property in the company until paid for, and

the question is stated by Sir Henry Strong, C.J., to be whether the machinery had been immobilized by being placed by Kelly Brothers in the building which they had constructed to be used as a sawmill, to the detriment of the right of property, which, by the agreement, the respondents had stipulated should be retained, and remain vested in them until the price was fully paid. He held that the law of France was identical on this point with the law of Quebec. The property in question was not immoveable by nature. Had the fixtures been detached from the building, as they easily could have been, they would have had an independent existence as moveables, "which is the proper test to be supplied in distinguishing immoveables by destination from immoveables by nature." Quoting from Huc, the learned Chief Justice laid down the principle that in order to give moveable property the character of immoveable by destination, it is necessary that the person incorporating the moveables with the immoveables should be, at the time, owner both of the moveables and of the real property with which they are so incorporated.

Purchase of shares in a boat to be built. In *Cameron v. Thornhill*, 1 U. C. Q. B. 132, defendant subscribed for shares in a steamer which another person intended to build. On refusal to accept and pay for the shares, it was held that he could only be sued on the special agreement and not for the price of the shares in the boat, not yet built, as if they were a vendable commodity.

Can the contention that property did not pass for want of separation be made by a wrong-doer sued in trover? In *Coffey et al. v. The Quebec Bank*, 20 U. C. C. P. 110, one Taylor sold to the plaintiffs 2,000 bushels of wheat out of 3,000 bushels owned by him and lying in his bins in a warehouse of Scott, whose receipts he held. Taylor and Scott both left the country, when defendants seized the whole quantity and converted it to their own use. The plaintiff brought trover for the wheat, and the defence was that no property had passed for want of separation. The evidence was that Taylor did not in any way repudiate the sale, and Scott said he would not have delivered the wheat in either of the bins to anyone but the plaintiffs without retaining enough to satisfy the plaintiffs' receipt for 2,000 bushels.

The court, by a *tour de force*, upheld the finding of the jury, that there had been an appropriation of the wheat in one of the bins, and Hagarty, C.J., said he inclined very much to the opinion that, where a wrong-doer seizes the entire quantity, it does not lie in his mouth to raise the objection of non-appropriation or non-severance.

Vendor's remedy where property reserved. He may enter upon buyer's land to retake, but must not use force. A lot of machinery was sold to plaintiff under an agreement by which the property, wherever it should be, was to remain vested in the vendor and subject to his order until paid for in full. The purchase money was in arrear, and the defendant vendors were threatening to send men to the plaintiffs' mills and by force take away portions of the machinery claimed by them, whereupon plaintiffs obtained an injunction. Boyd, C., said that to the extent to which force was threatened he thought the injunction had rightly issued, but the plaintiffs were also in the wrong in not acceding to the claim of the defendants. The Ontario Act 51 Vic. Ch. 19, Sec. 4, recognized the right of the owner of a chattel sold conditionally to take possession thereof on breach of the condition and retain the same for twenty days to enable the bailee or his successor in interest to redeem the same as therein expressed. But irrespectively of statute, "it is the common law right of a person whose
"chattels are on the land of another under some ar-
"rangement which has ended, to enter upon the land to
"resume possession of his goods, without thereby com-
"mitting a trespass, *Patrick v. Colerick*, 3 M. & W. 483.
"But, as said by Blackstone in the passage cited in the
"argument of that case, 'this right of recapture shall
"never be executed where such execution must occasion
"strife and bodily contention or endanger the peace of
"society.' The defendants had the legal right to enter
"upon the mill premises in order to resume actual posses-
"sion of the machinery (giving notice and using all care
"in so doing), but it would be illegal for them to take
"possession by force." The injunction was modified in accordance with this ruling, and plaintiffs were likewise enjoined from forcibly interfering with the rights of the

defendants. *Traders Bank v. G. & J. Brown Mfg. Co.*, (1889), 18 O. R. 430.

Attornment by bailee required to pass property. *Jones v. Henderson*, 3 Man. 433, affirms the principle that where goods are held by a warehouseman, an assignment or order for delivery does not pass the property until the warehouseman has assented to hold the goods as agent of the purchaser. The cases on this point arise chiefly in connection with the question of a compliance with the Statute of Frauds, where goods are in the hands of a bailee. Attornment by the bailee is necessary in such cases to constitute actual receipt by the purchaser.

Reservation of jus disponendi.

Where the bill of lading is taken to vendor's order only to secure payment, in whom is the property? The answer ordinarily given to this question is that the property remains in the vendor until the bill of lading is transferred to the vendee, but the cases present great difficulty and some conflict of opinion. Such a conflict was developed in the case of *Williams v. Corby et al.*, decided by the Ontario Court of Appeal, 5 Ont. A. R. 626, and by the Supreme Court of Canada, 7 S. C. R. 470. The difference of opinion in this case depended largely upon the different views taken of the facts, the Ontario Court of Appeal and Strong, J., dissenting, in the Supreme Court of Canada, holding that the case was not one of a sale by the consignor as principal, but a purchase and shipment by him, as a commission merchant and as agent for the consignees, while the majority of the Supreme Court of Canada held that the case was not one of agency, but a sale by Williams, the plaintiff, on his own account to the defendants. As thus understood, the case was that of a sale of corn by the plaintiff, doing business at Toledo, Ohio, to the defendants, who were distillers at Belleville, Ontario. The vendors took a bill of lading, making the goods deliverable to a bank, by which the draft for the price was discounted, and the draft and bill of lading were forwarded to the agency of the bank at Belleville, with instructions that the bill of lading should not be transferred to the purchasers until the

draft was paid. The draft was drawn at ten days, while the time consumed in the voyage would ordinarily be only five days, so that it would not be possible for the consignees to get delivery until several days after the arrival of the vessel unless they anticipated the due date of the draft. What happened was that the corn became heated in transit owing to unusual delay in the Welland Canal, and the cargo was sold for the benefit of whom it might concern. Sir William Ritchie held that there had been a failure on the part of the plaintiffs to fulfil the contract. The defendants had never received the corn, and never were placed in a position to receive it, or entitled in any way to interfere with it. When it was agreed that the corn should be paid for by draft at ten days, it was no part of the contract that the defendants should not be entitled to the corn until payment of the draft; the contract clearly was that the corn should be shipped to the defendants, and on acceptance of the draft be deliverable to them by the carrier on arrival at Belleville. After shipment and obtaining an acceptance of the draft, plaintiff was to retain no property in or right to the corn, except possibly his right of stoppage *in transitu*. But the plaintiff never so shipped the corn to defendants, never parted with the property or control of the corn, and never placed defendants, though they accepted the draft, in a position to demand or be entitled to receive delivery of the corn on its arrival at Belleville. On the contrary, the plaintiff shipped the corn deliverable to the Merchants' Bank of Toledo, and most clearly never could have intended that the property should pass, or the bill of lading be handed to the defendants until they paid the draft.

The dissenting opinion of Sir Henry Strong (then Strong, J.) held, with the Ontario Court of Appeal, that the shipment had been made by the plaintiffs as commission agents, but that the contract of agency was not the only one between the parties, but there also existed the relation of vendor and purchaser, as explained by Mr. Justice Blackburn in *Ireland v. Livingstone*, L. R. 5 H. L. 395, in the House of Lords. He held that the property in the corn had passed and vested in the purchasers, subject to the rights of the bank, on the day on which the schooner

sailed from Toledo, and as the damage to the corn occurred after that date, there was no failure of consideration, and the plaintiff was entitled to recover. The remarks of the learned judge on this subject, although occurring in a dissenting opinion, are too valuable to be omitted.

“ The decision of the present case, which depends, in my opinion, altogether on the questions whether the property in this corn had vested in the appellants before it became damaged, or whether, if the property in the corn had not passed to the appellants, it was by the stipulation of the parties at the risk of the purchasers, is to be governed by the ordinary principles of the contract of sale. The passing of the property under a contract for the sale of goods is said to be altogether a question of intention, the rules laid down being merely intended as guides for discovering or presuming the intention when the parties have not clearly expressed it. There can be generally no stronger evidence of a vendor’s intention not to pass the property to the vendee than the fact that he takes the bill of lading in his own name. In the present case, by the terms of the bill of lading, the goods were deliverable to the person whose name should be inserted in the margin, and the name inserted was that of the bank which discounted the draft for the price, and to whom the bill of lading was delivered as collateral security. The effect of this was clearly to vest a special property in the corn in the bank, and this special property was in the nature of a hypothecation of the goods, designed to secure the payment of the draft, and subject to which the absolute legal property either remained in the respondent or became vested in the appellant.

“ Had the bill of lading been taken originally in the respondent’s own name and then endorsed by him to the bank, it would be strong evidence, even between parties whose relations were such as those before us, to show that the vendor intended to reserve the property, subject to the rights of the bank, to himself, at least until by some further act he indicated an intention to pass it to the purchasers. Here, however, the vendor seems to have parted with all power over the disposition of the property, when he handed over the bill of lading to the bank.

“ However this may be, it seems to me clear, both upon
“ authority and principle, that when, on the same day as
“ that on which the vessel sailed and the bill of lading was
“ handed over to the bank, the respondent sent the letter
“ of advice, enclosing the invoice, stating that the goods
“ were for account ‘ *and risk* ’ of the appellants, he did an
“ act which divested him of any property in the goods and
“ vested it in the appellants. In other words, when he said
“ the goods were to be at the risk of the appellants he
“ meant what he said. Had the invoice merely stated the
“ goods to have been purchased on account of the appel-
“ lants, it might not have been so conclusive; but, even in
“ that case, I should have thought that every presumption
“ ought to be made against any intention on the part of
“ the respondent, a mere factor, whose commission had
“ been included in the bill drawn for the price, to retain
“ the property and so subject himself to the risk of any
“ loss which the insurance might be insufficient to cover,
“ more especially as he had so dealt with the bill of lading
“ as to authorize its delivery to the vendees upon payment
“ of the draft drawn for the price; but the insertion of the
“ word ‘ *risk* ’ in the invoice seems to me to make it unnec-
“ essary to resort to any such presumption, and to be amply
“ sufficient to vest the property in the appellants from the
“ date at which the invoice and letter of advice were trans-
“ mitted—the 16th September—the day on which the
“ vessel sailed. In the case of *Jenkyins v. Brown*, which I
“ mentioned during the argument of this appeal, the facts
“ were almost identical with those in the present case, and
“ the decision itself entirely warrants the opinion already
“ expressed as to the legal result of those facts. In Mr.
“ Benjamin’s work on Sales, he thus summarizes the
“ facts of that case: Klingender, a merchant in New Or-
“ leans, had bought a cargo of corn on the order of
“ plaintiffs and taken a bill of lading for it deliverable to
“ his own order. He then drew bills for the cost of the
“ cargo on the plaintiffs, and sold the bills of exchange to
“ a New Orleans banker, to whom he also endorsed the bill
“ of lading. He sent invoices and a letter of advice to the
“ plaintiffs showing that the cargo was bought and shipped
“ on their account and at their risk. Held, that the prop-

“erty did not pass to the plaintiffs, as the taking of the
“bill of lading by Klingender in his own name was
“‘nearly conclusive evidence’ that he did not intend to
“pass the property to the plaintiffs; that by delivering
“the endorsed bill of lading to the buyer of the bills of
“exchange he had conveyed to them ‘a special property’
“in the cargo, and by the invoice and letter of advice to
“the plaintiffs he had passed to them the general property
“in the cargo subject to this special property, so that the
“plaintiffs’ right of possession would not arise until the
“bills of exchange were paid by them.

“I am unable to distinguish this case of *Jenkyns v. Brown* from the present, and I am, therefore, of opinion
“that in the present case the property, subject to the rights
“of the bank, was vested in and at the risk of the appellants from the 16th of September, the day on which the
“schooner sailed from Toledo, and, as the damage to the
“corn occurred after that date, there was no failure of
“consideration, and the respondent was entitled to recover. Further, as showing that the terms of the invoice,
“making the goods as shipped at the buyer’s risk, was a
“sufficient indication of intention to pass the property, I
“refer to the cases of *Castle v. Playford* and *Martineau v. Kitching*, which are also authorities for the respondent in
“another view of the case, which I shall hereafter state.”

In a note at page 499 it is pointed out that the effect of transferring the bill of lading by way of security is only to vest a special legal property in the goods in the secured creditor, and to leave the general legal property in the owner, subject to the charge, and not to vest the whole legal property in the secured creditor, leaving only an equitable right of redemption in the transferror; for which the case of *Glyn, Mills, Currie & Co. v. The East and West India Dock Company*, 6 Q. B. D. 475, and *Burdick v. Sewell*, 10 Q. B. D., 363, are referred to, also Campbell on Sales, p. 338.

Surrender of bill of lading to procure inspection of goods does not make purchaser liable on attached draft. In *Imperial Bank v. Hall*, 4 Terr. 498, it was held that where a consignor of perishable goods draws through a bank upon the consignee at sight for the amount of the contract price

and attaches the bill of lading to the draft the consignee is entitled to examine the goods before accepting them and paying the draft. If it is necessary to obtain the bill of lading from the bank and surrender it to the carrier in order to make the examination, the fact that the consignee does so and thereby makes it impossible to return the bill of lading to the bank, does not render him liable to pay the draft.

The fact that the bank endorses the bill of lading to the consignee in order to enable him to examine the goods does not transfer the right of property in them to the consignee, and if the latter deals with the goods as his own by re-shipping and selling them he becomes liable to the bank in an action for conversion for the goods or their value. On appeal the judgment was varied in some respects, but not in such a way as to invalidate any of the above propositions.

Transfer of bill of lading. Effect of want of endorsement. In *Gosselin v. Ontario Bank*, 36 S.C.R. 406, it was held that the absence of an endorsement on a bill of lading by the assignee therein named, was notice of an outstanding interest in the goods represented by the bill, and placed persons proposing to make advances upon the goods, upon enquiry in respect of the circumstances affecting them. On failure to take the proper measures in regard to ascertaining these facts and obtain clear title to the bills and goods, any pledge thereof must be assumed to have been made subject to all rights of such consignee. The Chief Justice dissented, holding that where the sale had been completed by "actual tradition and delivery," the mere absence of the consignee's endorsement upon shipping bills representing goods, could not have the effect of reserving any rights in the vendor.

CHAPTER II.

CONDITIONS PRECEDENT TO THE PASSING OF THE PROPERTY, IMPLIED BY LAW (a).

WHEN the parties are agreed as to the goods on which the agreement is to attach, the presumption is, that the parties intend the right of property to be transferred at once, unless there be something to indicate a contrary intention. An agreement, therefore, concerning the sale of specific or ascertained goods, is *prima facie* a sale of those goods. But this arises merely from the presumed intention of the parties, and if it appear that the parties have agreed, not that there shall be a mutual credit by which the property is to pass from the seller to the buyer and the buyer is to be bound to the seller for the price, but that the exchange of the money for the goods shall be made on the spot, no property is transferred, for it is not the intention of the parties to transfer any. In other words, a contract for the sale of specific chattels is *prima facie* a contract to transfer the property in consideration of the buyer becoming bound to pay the price. But if the parties choose so to agree, it may be a contract to transfer the property, in consideration of the buyer actually paying the price, and not merely of his engagement so to do. This principle of law now appears in section 18, rule 1, of the Sale of Goods Act, which provides that, in the absence of a different intention, where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

In the earlier English law books, it seems to be assumed that all agreements are of a ready money character, unless there is something to indicate a contrary intention. Thus in

(a) As to implied undertakings as to title, &c., see Sale of Goods Act, s. 12.

Noy's *Maxims* (a), it is said, "In all agreements there must be *quid pro quo* presently, except a day be expressly given for the payment, or else it is nothing but communication. . . . if the bargain be that you shall give me 10*l.* for my horse, and you gave me one penny in earnest, which I accept, this is a perfect bargain, you shall have the horse by an action on the case, and I shall have the money by an action of debt. If I say the price of a cow is 4*l.*, and you say you will give me 4*l.*, and do not pay me presently, you cannot have her afterwards without I will, for it is no contract; but if you begin directly to tell your money, if I sell her to another, you shall have your action on the case against me. . . . If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse is, by the bargain, in the bargainee or buyer; but if he presently tender me my money, and I refuse it, he may take the horse, or have an action of detinue; and if the horse die in my stables, between the bargain and delivery, I may have an action of debt for the money, because by the bargain the property was in the buyer."

The part payment, or naming a day for payment, clearly indicates an intention in the parties that they should have some time to complete the sale by payment and delivery, and that they should in the meantime be trustees to each other, the one of the property in the chattel, the other of the price; and Noy was of opinion that the law, in such a case, executed their intention, and transferred the property at once subject to the seller's rights. In the case which he puts of the cow, there was nothing to indicate such an intention to give time, and he seems to think that it was to be presumed, that such an intention did not exist. This presumption was, probably, reasonable and just in the simplicity of early times, but with the change of customs the presumption also has changed, and in modern times (at least in commercial transactions), the parties are taken to contemplate an immediate transfer of the property in the goods, and an immediate

(a) *Noy's Maxims*, pp. 87, 88, 89.

obligation to pay the price, with a reasonable time for delivery and payment, unless there be something to show a different intention. "Generally speaking," said Bayley, J., in *Simmons v. Swift* (a), "where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price." But where the presumption is rebutted, either from the nature of the transaction, or from other circumstances that show that the transaction is an exchange for ready money, the modern law does not differ from the ancient. Thus in the case of *Bussey v. Barnett* (b), in 1842, the Exchequer held, that where goods were sold and delivered in a retail shop, the nature of the transaction showed, that the goods and money were to be exchanged simultaneously, and, consequently, that proof that the money had then been paid, amounted in legal effect to proof that the buyer never was indebted to the seller, and not, that having been indebted, he had paid the debt.

In *Bishop v. Shilitto* (c), in 1819, the plaintiff brought an action of trover for some iron which had been delivered by him to the defendant under a contract, by which the defendant was to take certain bills out of circulation, which had not been done. The defendant's counsel objected, that the property had been transferred, and that the proper remedy was by an action on the contract. Chief Justice Abbott, however, left it to the jury to say, whether it was part of the agreement that the delivery of the iron and the re-delivery of the bills, were to be contemporaneous; and the jury having found that it was, the Chief Justice, and afterwards the full Court, held the plaintiff entitled to recover.

However, except under particular circumstances, the parties to an agreement concerning the sale of specified chattels are taken to intend an immediate transfer of the right of property

(a) *Simmons v. Swift*, 5 B. & C. 862.

(b) *Bussey v. Barnett*, 9 M. & W. 312.

(c) *Bishop v. Shilitto*, 2 B. & A. 329, n.

from the seller to the buyer, and the law fulfils their intention, and transfers the right of property accordingly. But there is nothing to prevent the parties from coming to an agreement that the property shall be transferred when and not until certain conditions have been performed; when the agreement is of that nature, the law fulfils the intention of the parties. The property is not transferred before the performance of the conditions; if nothing has occurred in the meantime to prevent it, the property is transferred as soon as the conditions are performed.

Where, therefore, the agreement is for the sale of goods, and also for the performance of other things, it becomes important to ascertain whether the performance of any of those things is meant to precede the vesting of the property or not. This is a question of the construction of the agreement, and it may often happen that the parties have expressed their intention in a manner that leaves no room for doubt (*a*); when, however, they have not done so in express terms, the intention must be collected from the whole agreement, and the Courts have since the beginning of the last century adopted for this purpose some rules of construction which are, perhaps, some of them a little artificial. These rules, of which there is no trace in the Reports before the time of Lord Ellenborough, are laid down since the time of that learned Judge as rules of English law, in terms nearly equivalent to those in which they are laid down as rules of civil law.

They are twofold: the first is that where, by the agreement, the seller is to do anything to the goods for the purpose of putting them into that state in which the buyer is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property.

The second is, that where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods where the price is to depend on the quantity or quality of the goods; the per-

(*a*) See *post*, p. 209.

formance of those things, also, shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted.

These two rules are embodied, with certain qualifications, in section 18, rules 2 and 3, of the Sale of Goods Act:—

“Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

“Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.”

The first of these rules seems to be founded in reason. In general, it is for the benefit of the seller that the property should pass; the risk of loss is thereby transferred to the buyer, and as the seller may still retain possession of the goods, so as to retain a security for payment of the price, the transference of the property is to the seller pure gain. It is, therefore, reasonable, that where by the agreement the seller is to do something before he can call upon the buyer to accept the goods as corresponding to the agreement, the intention of the parties should be taken to be, that the seller was to do this before he obtained the benefit of the transfer of the property. The presumption does not arise, if the things might be done after the seller had put the goods in the state in which he had a right to call upon the buyer to accept them, and would be unreasonable where the acts were to be done by the buyer, who would thus be rewarded for his own default.

The final words of the statutory rules, “and the buyer has notice thereof,” are designed to prevent the hardship which might result in the risk being transferred to the purchaser without notice.

The second rule seems to be somewhat hastily adopted

from the civil law, without adverting to the great distinction made by the civilians between a sale for a certain price in money, and an exchange for anything else. The English law makes no such distinction, but, as it seems, has adopted the rule of civil law, which seems to have no foundation except in that distinction (*a*). In general, the weighing, &c., must, from the nature of things, be intended to be done before the buyer takes possession of the goods, but that is quite a different thing from intending it to be done before the vesting of the property; and as it must in general be intended that both the parties shall concur in the act of weighing, when the price is to depend upon the weight, there seems little reason why, in cases in which the specific goods are agreed upon, it should be supposed to be the intention of the parties to render the delay of that act, in which the buyer is to concur, beneficial to him. Whilst the price remains unascertained, the sale is clearly not for a certain sum of money, and therefore does not come within the civilian's definition of a perfect sale, transferring the risk and gain of the thing sold; but the English law does not require that the consideration for a sale should be in moneys numbered, provided it be of value.

These rules do not apply to cases where anything remains to be done by the *buyer*, even with full authority from the seller, but only to cases where something remains to be done by the seller (*b*).

The first case reported in which these rules are alluded to as rules of English law, is that of *Hanson v. Meyer* (*c*), in the year 1805. The facts of that case were, that Meyer having sold the whole of a parcel of starch in a warehouse at 6*l.* per cwt., directed the warehousemen to weigh and deliver the starch. Part of the starch was weighed and delivered, but before they had weighed the rest the purchasers failed, and Meyer, who was unpaid, countermanded the order to the warehousemen and took away the

(*a*) See *post*, p. 266, for further remarks on this point, and p. 275.

(*b*) *Furley v. Bates* (1863), 33 L. J. Ex. 43, *post*, p. 190.

(*c*) *Hanson v. Meyer*, 6 East, 614.

unweighed starch, and the assignees of the bankrupt purchasers brought an action of trover against him for so doing. The Court of King's Bench decided in favour of the defendant. The judgment of the Court was delivered by Lord Ellenborough, who observed, that by the terms of the particular contract, the price was made to depend upon the weight. "The weight, therefore, must be ascertained, in order that the price may be known and paid, and unless the weighing precede the delivery, it can never for those purposes effectually take place at all." The judgment was carefully worded, so as to decide no more than that this made the weighing a condition precedent to the buyer's right to take possession, or, as Lord Ellenborough worded it, their "*complete present* right of property;" but though not deciding anything as to the vesting of the general property in the buyer, it was an indication of the opinion of the Court of King's Bench.

The next case was *Hinde v. Whitehouse* (a), in 1807, a year later and in the same Court. There sugar lying in a bonded warehouse was sold by auction, on conditions of which the material part, as far as regards this point, was as follows: "The highest bidder to be the purchaser; to be at the purchaser's risk from the time of sale. . . . The duties are not yet paid, but we intend paying them to-morrow morning." The next morning was a holiday at the custom house, and therefore the duties could not be paid, and before the custom house opened again, the sugar was consumed by an accidental fire. The question in the cause was stated by Lord Ellenborough to be, "whether enough had taken place to change the property, and make them the goods of the purchaser;" and it was decided that the sale was complete "within the meaning of the parties to the conditions." "The words '*time of sale,*' and '*highest bidder to be purchaser,*'" said Lord Ellenborough, "all evidently relate to the transaction of selling at the time and place of auction, which was considered between them as effectual for the purpose of transferring the property, and the consequent risk of loss from

(a) *Hinde v. Whitehouse*, 7 East, 558.

“the buyer to the seller, notwithstanding the intermediate right of custody or lien upon the goods in the Crown, until the duty should be paid.” This case, therefore, decided that the property passed, because such was the intention of the parties appearing by the agreement in that particular case.

The rules were first applied as the ground on which the judgment of the Court turned in *Rugg v. Minett* (a), in 1809. There Rugg bought 24 lots of turpentine out of 27, which were sold by auction. By the terms of the sale, 25 out of the 27 lots were to be filled up by the sellers from the other two, and so made to contain each a specified quantity, and the two last lots were then to be measured and paid for according to their contents; Rugg's purchase included these two lots of uncertain quantities. The three lots which were not purchased by Rugg were filled up and removed, so that Rugg was clearly entitled to have the whole of what remained, and no difficulty could arise from the subject-matter of the sale not being ascertained. Rugg paid about 2,000*l.* on account of the turpentine; the greater part of the lots were filled up, and the others were being filled up, when, by an accidental fire, the whole was consumed, no part having been delivered. Rugg brought an action in the King's Bench to recover the 2,000*l.* he had paid on account, and the Court held that all those lots which were filled up before their destruction were the property of the buyer; and that the sellers were entitled to retain their price, but that the others remained the property of the sellers, who must therefore refund the price received on account of them. The test, according to Lord Ellenborough, was whether “everything had been done by the sellers which lay upon them to perform in order to put the goods in a deliverable state.” And Bayley, J., said that “if the sellers meant to relieve themselves from all further responsibility they should have done what remained for them to do; until that was done the property remained in them” (b).

(a) *Rugg v. Minett*, 11 East, 210.

(b) The Judges who decided this case appear from the report to have treated it rather as one governed by an inflexible rule of law, than as one to be governed

This decision was soon followed by a variety of cases in which the principle was recognised (*a*), though in most of them it was not necessary for the decision of the case then before the Court, as in some the goods were not specified, and in others the question was whether there was an actual delivery of the possession, as well as a change in the property ; but in one or two cases the decision was on the very point.

In *Zagury v. Furnell* (*b*), in July, 1809, about two months after *Rugg v. Minett* (*c*), where the contract was for the sale of 289 bales of goatskins, containing five dozen in each bale, at the rate of 1*l.* 17*s.* 6*d.* per dozen ; and it was proved that the custom of trade was for the seller to count the bales before delivery, and that these bales were all consumed by fire before they were counted. Lord Ellenborough, at Nisi Prius, decided, "that as the enumeration of the skins was "necessary to ascertain the price, this was an act for the "benefit of the seller, and as the act remained to be done "when the fire happened, there was not a complete transfer to "the purchaser, and the skins continued at the seller's risk."

And in *Simmons v. Swift* (*d*), which was decided by the King's Bench, in 1826, after Lord Ellenborough's death, the Court held that where a particular specified stack of bark was sold at 9*l.* per ton, the property did not pass until it was weighed, for from the nature of the contract it was a necessary part of it that it should be weighed, and the concurrence of the seller in the act of weighing was necessary. Bayley, J., said that "generally speaking, where a bargain is made "for the purchase of goods and nothing is said about payment or delivery, the property passes immediately, so as to "cast upon the purchaser all future risks if nothing further "remains to be done to the goods, although he cannot take "them away without paying the price. If anything remains

by that rule only where the parties themselves have not indicated their intention ; but the Sale of Goods Act clearly provides that the rule only applies in the absence of anything to indicate a different intention.

(*a*) *Wallace v. Breeds*, 13 East, 522 ; *Busk v. Davis*, 2 M. & S. 396 ; *Withers v. Lye*, 4 Camp. 237.

(*b*) *Zagury v. Furnell*, 2 Camp. 240.

(*c*) *Rugg v. Minett*, 11 East, 210.

(*d*) *Simmons v. Swift*, 5 B. & C. 857.

“to be done on the part of the seller, until that is done the property is not changed” (a).

In *Logan v. Le Mesurier* (b), in 1847, in the Privy Council, the sale was of a raft of red pine timber, lying at the date of the sale up the river, to be delivered at Quebec, consisting of 50,000 feet more or less, to be paid for at 9½d. a foot. The raft was floated to Quebec, where the greater portion of the timber was lost in a storm. The Court held that the property had not passed, and that the money paid could be recovered back. After the storm the buyers collected some of the timber, dressed and shipped it on their own account, but the Court held that this could not be taken as an admission that the property had passed, when the contract showed that it did not so pass (c).

In *Acraman v. Morrice* (d), in 1849, the plaintiffs were the assignees in bankruptcy of Swift, the seller, a timber merchant; the defendant was a timber merchant in London.

The course of dealing between Swift and the defendant had been for the defendant to inspect the felled trees belonging to Swift and to measure and mark such portions as suited him. Swift then cut off the rejected portions and carried the rest at his own cost to Chepstow, where he delivered it to the defendant. At the time of Swift's bankruptcy the timber, the subject of this action, had been marked, measured, and paid for by the defendant; but the rejected portions had not been cut off. The timber was then lying in the Forest of Monmouth, and the defendant, who had probably heard of Swift's bankruptcy, himself cut off those parts and carried the rest away. The Court held that the property had not passed.

In this and the preceding case, the action of the buyers long after the contract would hardly be evidence of what was the intention of the parties at the date of the contract.

In *Furley v. Bates* (e), in 1863, the contract as found by

(a) The note to *Rugg v. Minett*, 11 East, 210, on the preceding page, seems to be applicable to this case also.

(b) *Logan v. Le Mesurier*, 6 Moo. P. C. 116; 11 Jur. 1091.

(c) See also *Boswell v. Kilborn*, 15 Moo. P. C. C. 309; 8 Jur. N. S. 443.

(d) *Acraman v. Morrice*, 19 L. J. C. P. 57; 8 C. B. 449.

(e) *Furley v. Bates*, 33 L. J. Ex. 43; 2 H. & C. 200.

the jury was for the sale of an entire heap of fire-clay at 2s. a ton, the buyer to take it away at his own expense, in his own carts, and to have it weighed at a certain machine.

On three or four occasions the defendant had carted away portions of the heap and had had them weighed, but on the last occasion he carted away a portion of the heap, and put it into a barge, and the plaintiff observing what was going on, followed, and by agreement the amount in the barge was taken at 22 tons. The judgment of the Court, consisting of Pollock, C. B., Bramwell and Channell, BB., was delivered by Channell, B., who, after referring to the cases on this subject, and to the rule that the property does not pass where anything remains to be done to the goods for the purpose of ascertaining the price, said: "From a consideration of these cases, it appears that the principle involved in the rule above quoted is, that something remains to be done by the seller. It is, therefore, very doubtful whether the present case comes within the principle of the rule. But, however that may be, it is clear that this rule does not apply if the parties have made it sufficiently clear whether or not they intend that the property shall pass at once, and that their intention must be looked at in every case." The Court held that in this case that intention had been expressed, and that the property had passed.

In *Kershaw v. Ogden* (a), in 1865, the facts were that the defendant had contracted to purchase 4 specified stacks of cotton waste at 1s. 9d. a pound, and to send his own packer and sacks and carts to remove them. The defendant sent his packer with 81 sacks, into which the 4 stacks were put. Two days afterwards 21 of the sacks were weighed and taken to the defendant's warehouse, and returned to the plaintiff the same day as not being of the desired quality. The sale was not a sale by sample. The other sacks were not weighed, but the Court, consisting of Pollock, C. B., Martin and Bramwell, BB., held that the property in all the 81 sacks had passed. Pollock, C. B., considered the case the same as

(a) *Kershaw v. Ogden*, 34 L. J. Ex. 159; 3 H. & C. 717.

Furley v. Bates (a). Martin, B., said: "The question depends upon what was the contract, and the jury have found that it was a contract to buy four stacks of cotton waste specifically agreed upon, more or less, taking them for better or worse. If that finding is correct, of which I entertain no doubt, the result is that the property in four stacks passed to the defendants."

In the case of *Young v. Matthews* (b), in 1866, Moxon, a brickmaker, was indebted to Northern, and applied to him for a further advance, which Northern made in consideration of Moxon selling him 1,300,000 bricks at 26s. per 1,000. Northern then sent Lucas to the brickfield with a delivery order for the bricks, signed by Moxon; Moxon's manager told Lucas that he might have them as soon as a man who was in possession under the landlord's distress for £300, was paid. The manager pointed out three clumps of bricks, one of which was finished, and which he said should be taken first; another, still burning, which would be ready when the first had been taken; and a third, which was being formed of moulded bricks preparatory to burning, and stated that he would hold and deliver them to Northern's order. The £300 was not paid. Moxon became bankrupt, and the landlord then sold enough bricks to pay himself, and Northern sold the remainder to the defendant, who carried them away. The creditors' assignee brought trover. The Court, consisting of Erle, C. J., Willes, Byles, and Keating, JJ., held that the property had passed to Northern.

The judgment of the Court turned on the expressed intention of the parties. Erle, C.J., said: "There is no doubt that the parties could pass the property in all the bricks, whether finished or not, if such was their intention; and what passed amounted to this: Northern's agent said, 'Are all these appropriated to my principal?' and the seller's agent said 'Yes.'"

In *Martineau v. Kitching* (c), in 1872, the plaintiffs, who

(a) *Furley v. Bates*, 33 L. J. Ex. 43; 2 H. & C. 200.

(b) *Young v. Matthews*, 36 L. J. C. P. 61; L. R. 2 C. P. 127.

(c) *Martineau v. Kitching*, 41 L. J. Q. B. 227; L. R. 7 Q. B. 436.

were sugar refiners, carried on business as follows: They refined the sugar, ran it into moulds holding from 38 to 42 lbs., forming sugar-loaves; they marked each sugar-loaf, called a titler, with a distinctive number, and placed the titlers in their warehouse. The titlers were sold at so much per cwt., but were not weighed until they were delivered out of the warehouse to the buyer.

The defendant purchased a number of titlers marked as above, at so much per cwt., the contract being that they were to be paid for at one month, and to remain "at seller's risk for two months." He paid the price as calculated approximately, and resold certain of the titlers, which were given up to the sub-buyers on the production of the defendant's orders for delivery, and weighed on delivery. The remainder were consumed in a fire after the expiration of the two months, and before they had been weighed. The defendant refused to pay for them on the ground that the property had not passed, and that he was not bound to pay for them until it had passed; it was agreed that the payment he had made should be considered as made on another account.

It seems tolerably clear from the judgments, that if it had been necessary to decide whether the property had passed or not, the Court would have held that it had passed, but the case was decided on the words of the contract, "at seller's risk for two months," which showed that after two months they were to be at the buyer's risk no matter where the property was. As Blackburn, J., said (*a*), "If you show that the risk attached to the one person or the other, it is a very strong argument for showing that the property was meant to be in him. But the two are not inseparable. It may be very well that the property shall be in the one and the risk in the other."

The rule is further illustrated by a class of cases in which it was decided that where the agreement is that one party shall make and deliver some chattel, no property passes before the chattel is complete and in a deliverable state unless there be

(a) 41 L. J. Q. B. 237; L. R. 7 Q. B. 454.

something peculiar in the agreement. In several of these cases the decision of the Court, that no property passed, seems to have been given because the individual chattel had not been ascertained.

If it appear from the agreement that the intention of the parties is that the property shall pass presently, the property does pass, though there remain acts to be done by the seller before the goods are deliverable. It is to be observed that whilst the seller is unpaid it is exclusively for his interest that the property should pass, as he gets rid of the risk; but when he is partially or entirely paid it may be for the benefit of the buyer, for in the event of a paid seller becoming insolvent, the buyer, if the property has passed, has the goods as a security for his money, but if it has not passed he can at best recover such a proportion of the price paid as the estate of the insolvent can furnish. If, therefore, it appears by the agreement that the parties intended the price to be paid before the goods were put in a deliverable state, it affords an argument that the parties intended the property also to pass before the goods were in a deliverable state; and if the whole agreement show that such was the intention, the property does pass.

In *Mucklow v. Mangles (a)*, in 1808, Royland, who was a barge builder, contracted with Pocock to build him a barge. Pocock advanced him money on account from time to time to the full value of the barge, and when it was nearly finished Pocock's name was painted on the stern, but the report does not say by whose orders. Two days after it was finished it was seized under an execution. The Court held that the property had not passed to Pocock. Heath, J., said, "A tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another; if the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser for the goods so sold."

(a) *Mucklow v. Mangles*, 1 Taunt. 318.

The authority of this case has been considerably weakened by later decisions, and Best, C. J., and Park, J., in *Carruthers v. Payne* (a), doubted whether it would be followed if precisely the same facts came before the Court again.

In *Woods v. Russell* (b), in 1822, Paton, a shipbuilder, contracted to build a ship for the defendant, to be paid for by four instalments. The first and second were duly paid. When the ship was nearing completion the defendant chartered her for a voyage, with Paton's privity, and she was measured, also with Paton's privity, to the intent that the defendant might have her registered in his own name. Paton signed the necessary certificate of her build, and she was registered in the defendant's name, and the third instalment was then paid. The ship was not finished, and Paton's men continued at work on her. Paton became bankrupt, and two days afterwards the defendant took possession, and by his orders a rudder and some cordage, which Paton had bought for the ship, were taken from Paton's premises. Two days after that she was launched. The fourth instalment was never paid. The Court considered that the rudder and cordage, having been bought specifically for the ship, although not actually attached to it, were on the same footing, and held that the property had passed in the ship, rudder and cordage (c).

In *Clarke v. Spence* (d), in 1836, the facts were much the same as in *Woods v. Russell* (b), and after consideration the Court held that the property had passed, and Williams, J., delivering the judgment of the Court, put the decision on what appears to be the true ground. After referring to the language of Abbott, C. J., in *Woods v. Russell* (b), he continued: "The payment of the instalments may indeed be "evidence that the purchaser has approved of the fabric so "far as it has been constructed, and may therefore, as it "were, ratify the appropriation made by the builder; but in "itself it can operate nothing, unless it be by the contract

(a) *Carruthers v. Payne*, 5 Bing. 270.

(b) *Woods v. Russell*, 5 B. & Ald. 942; 1 D. & B. 587.

(c) See also *Goss v. Quinton*, in 1842, 3 M. & G. 825; *Ex parte Lambton* (1875), 44 L. J. Bank. 81; 10 Ch. App. 414.

(d) *Clarke v. Spence*, 4 A. & E. 448.

“made a condition precedent to the vesting of the property. “It is not so made by the contract in question in express terms; neither was it in the case of *Woods v. Russell* (a); “but we apprehend that the judgment in that case is founded “on the notion that provision for the payment regulated by “particular stages of the work is made in the contract, with “a view to give the purchaser the security of certain portions “of the work for the money he is to pay, and is equivalent “to an express provision that on payment of the first instalment the general property in so much of the vessel as is “then constructed shall vest in the purchaser.”

In *Laidler v. Burlinson* (b), in 1837, a shipbuilder entered into an agreement with several parties, of whom the plaintiff Laidler was one, by which he was to complete a vessel then in his yard, and they were to take shares in the vessel and pay portions of the price. Before the vessel was complete Laidler, who was to take one-fourth of the vessel, paid the builder in advance, but that was voluntary on his part, as it was no part of the original agreement; then the builder became bankrupt, and the Exchequer decided that the property of the incomplete vessel was in the bankrupt, and consequently that his assignees were entitled to it, and that Laidler had no specific interest in the vessel. Parke, B., in the course of the argument said: “If the parties agreed “to buy that particular ship when complete, the property “would not pass, though the builder could not comply with “the contract by delivering another vessel.” And in delivering judgment, Lord Abinger said: “A man may agree to “purchase a ship when finished, or as she then stands. Of “which sort is this contract? Did it pass the property to “the purchaser presently, or was it to pass when the ship “was finished? I think it is of the latter description.” And Parke, B., said, “It was an entire contract to purchase “the ship when finished, and no property passed till then.”

In *Tripp v. Armitage* (c), in 1839, Bennett had contracted

(a) *Woods v. Russell*, 5 B. & Ald. 942; 1 D. & R. 587.

(b) *Laidler v. Burlinson*, 2 M. & W. 602.

(c) *Tripp v. Armitage*, 4 M. & W. 687.

to build an hotel for the defendants. Other parties had contracted for the painting, glazing, and iron work. The money was to be paid by instalments, and at the time when Bennett became bankrupt the defendants had advanced him more money than he was entitled to by the contract, on the security of all the materials which had been or should be brought by him on to the premises. Before his bankruptcy he had brought some window frames on to the premises, which had been approved of by the clerk of the works appointed by the defendants, and he had then taken them away to his own workshops for the purpose of having some pulleys fitted to them. Bennett's assignees claimed them, and the Court held that the property had not passed to the defendants. Both Lord Abinger, C. B., and Parke, B., put their judgments on the ground that this was not a contract of sale of a specific chattel, as in *Clarke v. Spence* (a) and other cases, but a contract to do work, *i.e.*, to build an hotel, to which was incident the supplying and fixing of window frames. If the frames had been fixed to the freehold then the case would have been different, and the frames would have come within the agreement as having been brought upon the premises. The Court seems to have considered the case as an advance of money to enable a contractor to carry out his work made on the security of goods which had been at the date of the agreement, or might afterwards be, affixed to the freehold. The approval of the clerk of the works was considered to be merely an assent to the suitability of the materials (b).

In *Baker v. Gray* (c), in 1856, it was agreed that a ship-builder should build a ship for the defendant, to be paid for by instalments, and that the property in the ship should pass to the defendant on payment of the first instalment, and that in case the builder should not complete the vessel within the time agreed upon, it should be lawful for the defendant to take possession of and finish her, "using such of the

(a) *Clarke v. Spence*, 4 A. & E. 448.

(b) See also *Williams v. Fitzmaurice*, in 1858, 3 H. & N. 844, where, however, this point does not appear to have been urged.

(c) *Baker v. Gray*, 25 L. J. C. P. 161; 17 C. B. 462.

“materials of the builder as should be applicable for the “purpose.” The builder being in arrear, the defendant did take possession, and he also removed a considerable quantity of timber which the builder had provided and prepared for the building of the ship, from the builder’s yard and placed it inside the hull of the ship, but up to the date of the builder’s bankruptcy he had not actually used it in the construction of the ship. It was held that as he had not in fact used it, the property in the timber passed to the assignees on the bankruptcy (a).

In *Wood v. Bell* (b), in 1856, Joyce, a shipbuilder, agreed to build a steamship and engines for the plaintiff, to be paid for by instalments. The building of the ship and engines went on contemporaneously in the same yard. The plaintiff made advances to Joyce, which Joyce acknowledged to be advances on the ship. The ship and engines were built under the superintendence of the plaintiff’s inspector, and the plaintiff’s name was stamped on the keel. There was ample evidence that both the engines and a number of plates lying in the yard were appropriated to this contract, but neither the engines nor those plates had been fixed in their places. Joyce, before his bankruptcy, admitted that the ship belonged to the plaintiff. Lord Campbell, C. J., delivering the considered judgment of the Queen’s Bench, held that the property in both the ship and the engines and plates had passed to the plaintiff, and this judgment was affirmed on appeal to the Exchequer Chamber so far as the ship was concerned, but reversed as to the engines and plates. Jervis, C. J., delivering his judgment, in which Pollock, C. B., Alderson, B., Cresswell, Crowder, Willes, JJ., and Bramwell, B., concurred, said: “The question is, what is the ship? not, what is “meant for the ship? I think those things pass which “have been fitted to the ship, and have once formed part of “her, as, for instance, a door hung upon hinges, although “afterwards removed for convenience. I do not think the

(a) See *Rouch v. Great Western Ry. Co.*, 1 Q. B. 51.

(b) *Wood v. Bell*, 5 E. & B. 772; and 25 L. J. Q. B. 148; 6 E. & B. 355; and 25 L. J. Q. B. 321.

“circumstance that materials have been fitted and intended
“for the ship makes them part of the ship.”

The judgment of the Queen's Bench on this point seems to be the one more consistent with the recent authorities. If the true principle be, that where an advance is made on the security of specified although unfinished articles, the law considers that as very strong evidence to show that an intention to pass the property existed, then that argument, which is used to show that the property in the ship has passed, is precisely applicable to show that the property in the engines and plates passed. The property should pass for the same reason, and not because one thing has become, or was intended to become, a part of the other (a).

In the *Anglo-Egyptian Navigation Company v. Rennie* (b), in 1875, the plaintiffs were the owners of a steamship whose engines and boilers required considerable repairs and many new parts. The defendants contracted to do the whole of the work for 5,800*l.*, payment by instalments to be paid on the certificate of the plaintiffs' inspector. The defendants proceeded with the work while the ship was at sea, and on the certificate being given received payment of one instalment. The plaintiffs then heard of the loss of the ship at sea, and in due course paid a second instalment. The defendants subsequently heard of her loss, and at the time of hearing of it had completed about three-quarters of the work. The plaintiffs demanded from the defendants those parts which had been made and approved when the instalments were paid, on the ground that the property had passed to them. But the Court held that it had not passed, adopting Mr. Benjamin's argument that the complicated nature of the contract made it impossible to attribute the instalments to any particular part of the work ; and that the object of the stipulation as to instalments was to lessen the defendants' risk, for they would not have been able to make a claim to a penny until the whole job had been completed but for that stipulation.

(a) See also *McBain v. Wallace*, in 1881, 6 App. Ca. 588.

(b) *Anglo-Egyptian Navigation Co. v. Rennie*, 44 L. J. C. P. 130; L. R. 10 C. P. 271.

In *Seath v. Moore* (a), in 1887, the principles governing these cases were laid down by Lord Watson as follows: “Where it appears to be the intention, or in other words, “the agreement, of the parties to a contract for building a “ship, that at a particular stage of its construction the vessel, “so far as then finished, shall be appropriated to the contract “of sale, the property of the vessel as soon as it has reached “that stage of completion will pass to the purchaser, and “subsequent additions made to the chattel thus vested in the “purchaser will, *accessione*, become his property. It also “appears to me to be the result of these decisions that such “an intention or agreement ought (in the absence of any “circumstances pointing to a different conclusion) to be “inferred from a provision in the contract to the effect that “an instalment of the price shall be paid at a particular “stage, coupled with the fact that the instalment has been “duly paid, and that until the vessel reached that stage the “execution of the work was regularly inspected by the “purchaser, or some one on his behalf. I do not think it “is indispensable, in order to sustain that inference, that “there shall be a stipulation for payment of an instalment “in the original contract, or that the stipulated instalment “shall have been actually paid. The absence of these considerations, which are, in themselves, of great importance, “might, in my opinion, be supplied by other circumstances. “At all events, whenever during the currency of a contract “which contains no such stipulation, the parties in good “faith agree that the purchaser shall pay a sum to account “of the price, and that the vessel, so far as constructed at “the date of that payment, shall be appropriated to the “contract, I see no reason to doubt that the new covenant “so made ought to have the same effect as if it had been a “term of the original contract. I am, however, of the opinion “that, by the law of England, in order to pass the property “as sold, there must always be facts proved or admitted “sufficient to warrant the inference that the purchaser has

(a) *Seath v. Moore*, 55 L. J. P. C. 54; 11 App. Ca. 350.

“agreed to accept the *corpus* so far as completed as in part
“implement of the contract of sale.

“There is another principle which appears to me to be
“deducible from these authorities, and to be in itself sound,
“and that is, that materials provided by the builder and
“portions of the fabric, whether wholly or partially finished,
“although intended to be used in the execution of the
“contract, cannot be regarded as appropriated to the con-
“tract or as ‘sold,’ unless they have been affixed to or in
“a reasonable sense made part of the *corpus*. That appears
“to me to have been a matter of direct decision by the Court
“of Exchequer Chamber in *Wood v. Bell* (*ante*, page 198). In
“*Woods v. Russell* (*ante*, page 195) the property of a rudder
“and some cordage which the builder had bought for the
“ship was held to have passed in property to the purchaser
“as an accessory of the vessel; but that decision was
“questioned by Lord Chief Justice Jervis, delivering the
“judgment of the Court in *Wood v. Bell*, who stated the
“real question to be, ‘what is the ship, not what is meant
“‘for the ship,’ and that only the things can pass with the
“ship ‘which have been fitted to the ship and have once
“‘formed part of her, although afterwards removed for
“‘convenience.’ I assent to that rule, which appears to
“me to be in accordance with the decision of the Court of
“Exchequer in *Tripp v. Armitage* (*ante*, page 196).”

In *Bellamy v. Davey* (a), in 1891, the plaintiff entered into a contract with the defendants to erect two petroleum tanks, to be “finished . . . and left ready to test with water in the “usual way,” payment to be made in certain instalments after completion. When one tank was nearly completed, and the other only just begun, the defendants became insolvent. It was held that as the contract was for the sale and delivery of complete tanks ready for testing, the property had not passed.

In *Reid v. Macbeth* (b), in 1904, a firm of shipbuilders entered into a contract with a firm of shipowners to build a ship to be classed 100 A1 at Lloyd’s, the building to be

(a) *Bellamy v. Davey*, 60 L. J. Ch. 778; [1891] 3 Ch. 540.

(b) *Reid v. Macbeth*, [1904] App. Ca. 223.

superintended by the shipowners. The contract contained the following clause :—"The vessel as she is constructed, "and all her engines, boilers and machinery, and all materials "from time to time intended for her or them, whether in "the building yard, workshop, river, or elsewhere, shall "immediately as the same proceeds become the property of "the purchasers, and shall not be within the ownership, "control, or disposition of the builders, but the builders "shall at all times have a lien thereon for their unpaid "purchase-money." The shipbuilders became bankrupt before the vessel was completed. Certain iron and steel plates, which had been passed by Lloyd's surveyor, numbered by the makers with the number of the vessel and marked to show the position each plate was to occupy in the vessel, were, at the date of the bankruptcy, lying at certain railway stations at the orders of the shipbuilders, and these plates were claimed both by the trustees in the shipbuilders' sequestration and by the shipowners. It was held (following *Seath v. Moore, supra*) that the contract was for the sale of a complete ship, and that there was nothing in the contract to indicate a sale of the materials as distinct from the completed ship.

In *Laing v. Barclay (a)*, in 1908, the respondents, who were a firm of shipbuilders, agreed to build two ships for an Italian firm, according to specifications and under the superintendence of an agent appointed by the Italian firm, payment to be made by instalments at certain stages of the construction. The contract further provided that delivery of the ships was not to be completed until they had passed official trial trips, and had been approved by the Italian emigration authorities. After several instalments had been paid, but before the construction of the ships was completed, an English firm arrested the ships in Scotland, where they were being built, for a debt alleged to be due to them by the Italian firm. The arrestments were held null and void, on the ground that the property in the ships until completion remained in the builders.

(a) *Laing v. Barclay*, [1908] App. Ca. 35.

Where by the agreement the seller is to do things which may be done after the goods are in such a state that the seller may call upon the buyer to accept them, the performance is not presumed to be a condition precedent to the vesting of the property. Thus where the seller agrees to pay warehouse rent for the goods for some time after the sale, it has been decided that the property is transferred before the rent is paid. *Hammond v. Anderson* (a), in 1804, *Greaves v. Hepke* (b), in 1818.

There may be property by estoppel.

There are some cases in which it has been held that the property was changed, though acts necessary to put the goods in a deliverable state remained to be done by the seller, but it will be found on examination that the party against whom it was held in those cases that the property was changed had more or less distinctly made a statement that it had been changed, and that the decisions were made on that ground. A party's statement is always evidence against himself. In general it is not conclusive against him, and he may set up as his case that his previous statement was a mistake or even a falsehood, and then the question for those who try the cause is, whether his former statement or his present evidence is more worthy of belief. Much, of course, must depend, on the degree of deliberation with which the former statement was made, and the means which he had at the time of knowing the truth. But though in general a statement is not conclusive against the party who makes it, yet there are exceptions in which the law does not permit the party to avail himself of the inaccuracy of his assertion, and in technical language, he is estopped from setting up the truth against his former statement. "The rule of law," said Lord Denman, in delivering the judgment of the King's Bench, in

(a) *Hammond v. Anderson*, 1 N. R. 69.

(b) *Greaves v. Hepke*, 2 B. & A. 131,

Pickard v. Sears (a), "is clear, that where one by his words "or conduct wilfully causes another to believe the existence "of a certain state of things, and induces him to act on that "belief so as to alter his own previous position, the former is "concluded from averring against the latter a different state "of things as existing at the same time." This is a rule which within the limits applied by law is of great equity ; for when parties have agreed to act upon an assumed state of facts, their rights between themselves are justly made to depend on the conventional state of facts, and not on the truth. The reason of the rule ceases at once when a stranger to the arrangement seeks to avail himself of the statements which were not made as a basis for him to act upon. They are for a stranger, evidence against the party making the statement, but no more than evidence which may be rebutted ; between the parties they form an estoppel in law. This principle is well illustrated by those cases that at first sight seem inconsistent with the rule of construction already mentioned.

Thus in *Stonard v. Dunkin* (b), in 1810, Knight had agreed to pledge some malt lying in the defendants' warehouse to the plaintiff, and the defendants gave a written acknowledgment that they held the malt for the plaintiff, who had advanced Knight 7,500*l.* on that security. The plaintiff brought trover for the malt, and the defence was, that Knight had become a bankrupt, and that the property in the malt belonged to his assignees, because it had to be measured before the property would pass ; but Lord Ellenborough said, "Whatever "the rule may be between buyer and seller, it is clear the "defendants cannot say to the plaintiff the malt is not yours, "after acknowledging to hold it on his account. By so doing "they attorned to him, and I should entirely upset the "security of mercantile dealings were I now to suffer them "to contest his title."

In *Hawes v. Watson* (c), in 1824, the goods had been twice

(a) *Pickard v. Sears*, 6 A. & E. 474. See also *Carr v. L. & N. W. Ry. Co.*, 44 L. J. C. P. 113 ; L. R. 10 C. P. 316 ; and Sale of Goods Act, section 21.

(b) *Stonard v. Dunkin*, 2 Camp. 344.

(c) *Hawes v. Watson*, 2 B. & C. 540.

sold, and the first sellers were unpaid. The plaintiffs were *bonâ fide* buyers, and had *bonâ fide* paid their immediate seller, the first buyer, who had since become a bankrupt. The action was trover, brought against the warehousemen. It was proved that the first sale to the bankrupt was at a certain price per cwt., and that the goods had never been weighed, and the defence was that they remained the property of the first sellers, and not having been the property of the first buyer, could not have been by him rendered the property of the plaintiffs; but it was proved that before the plaintiffs paid the bankrupt, the defendants had signed a note, acknowledging that by order of the bankrupt they had transferred the goods to the account of the plaintiffs. Abbott, C. J., at *Nisi Prius*, ruled, that whatever might be the rights of the original sellers, the defendants having acknowledged that they held the goods on account of the plaintiffs could not now dispute their title, otherwise they would cause an innocent man to lose his money. The plaintiffs had a verdict, and the Court of King's Bench refused to disturb it.

In *Gosling v. Birnie* (a), in 1831, in the Court of Common Pleas, the partially paid seller of some timber lying on the defendant's wharf had given the buyer notice that if he did not pay the residue of the price the timber should be resold. The seller accordingly did resell the timber to the plaintiff, and gave him a written order on the defendant, at whose wharf the goods lay, to deliver the timber on receiving payment of a sum of money. The defendant, who knew all the facts, received the money, and verbally assented to hold the timber for the plaintiff; then the first buyer paid the seller the balance of the price, and the defendant gave him possession of the timber; for so doing the plaintiff brought an action of trover, to which the defence was that the plaintiff was not the owner of the goods, which were the property of the first buyer. The Court, however, said that whether the resale was void as against the first buyer or not might be a question, but that as against the defendant the case was clear. "The

(a) *Gosling v. Birnie*, 7 Bing. 339.

“defendant,” said Tindal, C. J., “is estopped by his own admissions, for unless they amount to an estoppel the word may as well be blotted from the law.”

In *Holl v. Griffin* (a), in 1833, one Wilson having goods at a wharfinger's at Stockton-upon-Tees, which were about to be sent to the defendants' wharf in London, obtained an advance from the plaintiff, on the security of the goods, giving him the Stockton wharfinger's receipt and the invoice, and at the same time instructing the defendants to deliver the goods to the plaintiff when they should arrive. The plaintiff showed the wharfinger's receipt to the defendants, who promised to deliver the goods, but refused to do so when they arrived, and the Court held that trover would lie.

In *Gillett v. Hill* (b), in 1834, the defendant, who was a wharfinger, had accepted, without any restriction, a delivery order for twenty sacks of flour given to the plaintiff by a person from whom he had purchased them, and the Exchequer held, that by so doing the wharfinger made evidence against himself that he had twenty specific sacks belonging to the seller, which he appropriated to the order, and that the jury, in an action of trover against the wharfinger, were warranted in finding that the property had been transferred to the buyer in some specific sacks in his custody. It does not appear that the buyer had paid the seller or otherwise altered his condition in consequence of the defendant's acts, so that probably the case did not amount to an absolute estoppel.

In *Woodley v. Coventry* (c), in 1863, Clarke had purchased 350 barrels of flour from the defendants: the flour was lying in the defendants' warehouse and was part of a larger quantity; the 350 barrels so purchased were not separated from the rest. Clarke wishing to raise money, applied to the plaintiffs for an advance, and gave them a delivery order on the defendants. The plaintiffs before making the advance sent a clerk with it to the defendants' warehouse, who made inquiry whether it was “all in order,” and was answered “Yes,” and

(a) *Holl v. Griffin*, 10 Bing. 246.

(b) *Gillett v. Hill*, 2 C. & M. 536.

(c) *Woodley v. Coventry*, 32 L. J. Ex. 185; 2 H. & C. 164.

thereupon lodged the order at the warehouse and it was accepted. The plaintiffs then advanced the money to Clarke, who subsequently absconded without paying the defendants for the flour; the defendants, as unpaid sellers, refused to deliver the flour to the plaintiffs. The plaintiffs brought trover. The Court held that they were entitled to recover; the question being, had the defendants acknowledged that they held the flour on behalf of the plaintiffs; if so, they were bound to deliver it or pay damages (a).

The case of *Knights v. Wiffen* (b), in 1870, very closely resembles *Woodley v. Coventry* (c). The facts are set out in Mr. Justice Blackburn's judgment, of which the following is an extract: "The defendant Wiffen had in his own warehouse "a large quantity of barley, and he sold to Maris, 80 qrs., "which on the contract between him and Maris, remained in "his possession as unpaid vendor. No particular sacks of the "barley were appropriated as between Maris and Wiffen; "but at the time the contract was made Maris had a right to "have 80 qrs. out of that barley appropriated to him; and at "the same time Wiffen, as the unpaid vendor, had a right to "insist on the payment of the price before any part of the "grain was given up. Maris afterwards entered into a contract with the plaintiff, Knights, by which he sold him 60 qrs. "of the barley, and Knights paid for them. A document "was given by Maris to Knights, in the shape of a delivery "order addressed to a station-master of the Great Eastern "Railway, instructing him to deliver to Knights' order "60 qrs. of the barley on his, Maris's, account. Knights "forwarded it to the station-master, enclosed in a letter "authorizing the station-master to hold for him. The station-master went to Wiffen and showed him the delivery order "and letter, and Wiffen said, 'All right; when you receive "the forwarding note, I will place the barley on the line.' "What does that mean? It amounts to this, that Maris

(a) *Stoveld v. Hughes*, 14 East, 308; and *McEwan v. Smith*, 2 H. L. R. 309; 13 Jur. 265.

(b) *Knights v. Wiffen*, L. R. 5 Q. B. 660; 40 L. J. Q. B. 51.

(c) *Woodley v. Coventry*, 2 H. & C. 164; 32 L. J. Ex 185.

“having given the order to enable Knights to obtain the
“barley, Wiffen recognized Knights as the person entitled to
“the possession of it. . . . The defendant knew that when
“he assented to the delivery order, the plaintiff, as a reason-
“able man, would rest satisfied. If the plaintiff had been
“met by a refusal on the part of the defendant, he could
“have gone to Maris and have demanded back his money ;
“very likely he might not have derived much benefit if he
“had done so, but he had a right to do it. The plaintiff did
“rest satisfied in the belief, as a reasonable man, that the
“property had been passed to him. If once the fact is
“established, that the plaintiff’s position is altered by relying
“on the statement and taking no steps further, the case
“becomes identical with *Woodley v. Coventry (a)*, and
“*Hawes v. Watson (b)*.”

In *Coventry v. Great Eastern Railway Co. (c)*, in 1883, the defendants negligently gave two delivery orders for the same consignment. The plaintiff in good faith made advances on both, and the Court of Appeal held that the defendants were estopped from denying that they held two consignments.

It is evident that those cases are not authorities that the property had in reality been transferred, but merely that the plaintiffs had a right as against the defendants to treat it as if it had been transferred. A warehouseman may make himself responsible to both parties: to one because he has rendered himself incapable of denying that the property belongs to that party, though in truth it does not; and to the other, because the property in truth is his. This may at times be very hard upon the warehouseman, who has by mistake represented that the property has been transferred, when in fact it has not, but it behoves him to see that his representations are not merely *bonâ fide* but accurate, or to abide the consequences of his inaccuracy.

(a) *Woodley v. Coventry*, 32 L. J. Ex. 185; 2 H. & C. 164; *ante*, p. 206.

(b) *Hawes v. Watson*, 2 B. & C. 540, *ante*, p. 204.

(c) *Coventry v. G. E. Ry. Co.*, 52 L. J. Q. B. 694; 11 Q. B. D. 776.

Effect of Express Conditions Precedent.

The parties may indicate an intention by their agreement, to make any condition, precedent to the vesting of the property, and if they do so their intention is fulfilled. Thus if goods are sent for sale on approval or return, no property vests until the buyer's approval, because that was the intention of the parties (a). And, as is said in Comyn's Digest, Condition (B. 13), "if a personal thing be granted on a condition precedent, the property does not vest till the condition "performed."

And so also in sales by sample no property will pass unless and until certain conditions, which are now under the Act, to be implied by law have been fulfilled. The question of sales by sample will be dealt with more particularly hereafter in discussing conditions as to quality and condition (b).

In the interval between the making of the agreement and the fulfilment of those conditions on which the property is to vest, the buyer has no interest in the thing itself; and it follows as a necessary consequence that if in the interval a third party has fairly acquired an interest in the chattel, the buyer cannot on the fulfilment of the conditions deprive him of it. He may have a remedy against the seller for breaking his agreement, by suffering this interest to be created, but he cannot take the property in derogation of a right acquired, whilst the agreement was only executory and he had no interest in the goods but only a chose in action.

Thus in *Mires v. Solesby* (c), in 1678, the owner of some sheep agreed with Alston that Alston should take the sheep home and pasture them till an agreed time, at so much a week, and if at the end of that time Alston would pay so much for the sheep, he should have them. Before the time was expired the owner sold the sheep to Mires, and in an action of trover by Mires against the servant of a buyer from Alston, the

(a) *Swain v. Shepherd*, 1 M. & Rob. 223; and Sale of Goods Act, section 18, rule 4, and s. 27.

(b) *Post*, p. 218.

(c) *Mires v. Solesby*, 2 Mod. 243.

Court decided that the agreement that Alston should have the sheep if he would pay such a sum of money at a future day, did not amount to a sale, and consequently that the sale to the plaintiff before that day was good, and the property of the sheep was in him.

But if the conditions are fulfilled, and the agreement made absolute whilst the seller remains owner of the goods, it seems that the agreement has the same effect as if it were then for the first time made without any condition, and consequently that the property passes at once.

In *Evans v. Thomas* (a), in 1608, it is said: "If one covenants with another, that if he will marry his daughter he shall have such a flock of sheep. He marries his daughter, the property of the sheep were presently in him, for it was but a personal thing, and the covenant is a grant." For this proposition, *Fitzherbert* (44 Ed. 3) is cited, but no such case is in the Year Book of that date.

In *Barrow v. Coles* (b), in 1811, Norton and Fitzgerald drew a draft on Voss, and indorsed it to the plaintiff; they at the same time transmitted to him a bill of lading of some goods with an indorsement, making the goods deliverable to Voss, if he should "accept and pay" the draft, if not to the holder of the draft. Both the bill of exchange and the bill of lading were sent to Voss, who accepted the bill of exchange, but did not pay it, and indorsed the bill of lading to the defendant. Lord Ellenborough held, that after the dishonour of the draft, the plaintiff might maintain trover against the indorsee of the bill of lading, who had obtained possession of the goods. It seems, however, probable, that the plaintiffs had some right of property in the goods, independently of being holders of the draft at the time it was dishonoured, though that is not mentioned in the report (c).

In the sale of goods, the parties frequently agree to conditions precedent to other things besides the passing of the property; for example, to the duty of the seller to deliver, or

(a) *Evans v. Thomas*, Cro. Jac. 172.

(b) *Barrow v. Coles*, 3 Camp. 92.

(c) See *post*, p. 291. Chapter on Equitable Assignments.

of the buyer to receive or pay for the goods. The parties are at liberty to import into the contract any terms they may please.

But it may be a question of some difficulty to decide whether a term or stipulation which forms part of the contract, creates a condition precedent, or is a mere collateral contract of warranty, for the breach of which the remedy is an action for damages. This is a question of law; as Williams, J., said in *Behn v. Burness* (a), in 1863, where a charter-party stated a ship to be "now in the port of "Amsterdam" when she was not so. "It was no part of "the Judge's duty to leave to the jury any question as to "the construction of the contract, or the materiality of any "of its statements. It was his function to construe the "contract with the aid of the surrounding circumstances "found by the jury, and to decide for himself whether the "statement that the ship was in the port, supposing it to "be untrue, was an essential part of the contract, or a mere "representation."

The meaning of the contract is that which both parties intended it should have; it is therefore the common intention of the parties which has to be looked for, and where they have reduced their contract into writing, that, if it is not ambiguous, is conclusive evidence of their intention, and to put a meaning on the contract is simply a question of construction for the Judge; but if it is ambiguous, so that the intention cannot be read on the face of the document, then the Judge may look at the surrounding facts and circumstances as found by the jury to assist him in discovering what it was that the parties probably intended. But, as Brett, M. R., said in *Sanders v. McLean* (b), "The Court has "no right to import anything into a contract which it would "not be clear to every reasonable man must have been "present to the minds of both contracting parties, and "agreed to by both."

(a) *Behn v. Burness*, 32 L. J. Q. B. 204; 3 B. & S. 756; discussed by C. A. in *Bentsen v. Taylor*, 63 L. J. Q. B. 15; [1893] 2 Q. B. at p. 281 *et seq.*; and see *Sale of Goods Act*, s. 11.

(b) *Sanders v. McLean*, 52 L. J. Q. B. 481; 11 Q. B. D. 336

Lord Ellenborough, C. J., in *Ritchie v. Atkinson* (a), in 1808, where the question was, whether the delivery of a complete cargo was a condition precedent to the right to recover freight, a short cargo having been delivered, said: "that depends, not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract: . . . The rule was well laid down by Lord Mansfield in *Boone v. Eyre* (b), that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a part, there a remedy lies on the covenant to recover damages for the breach of it; but it is not a condition precedent."

Bramwell, B., in *Roberts v. Brett* (c), in 1859, said: "Wherever the obvious good sense of the thing makes the performance of an act a condition precedent, it ought to be so construed. . . . The rules laid down in the notes to *Pordage v. Cole* (d) are very excellent guides, but not arbitrary tests." And Jervis, C. J., in the same case, said (e): "Where, on the whole, it is apparent that the intention is, that that which is to be done first is not to depend upon the performance of the thing that is to be done afterwards, the parties are relying on their remedy, and not on the performance of the condition; but, where you plainly see that it is their intention to rely on the condition, and not on the remedy, the performance of the thing is a condition precedent."

Where there is a condition precedent to the duty of either party to do some act, it is a good defence to an action for not doing that act to say that the condition precedent has not happened or been performed. But that defence is no longer available if the party wishing to set it up has waived his

(a) *Ritchie v. Atkinson*, 10 East, 306.

(b) *Boone v. Eyre*, 6 T. R. 573.

(c) *Roberts v. Brett*, 6 C. B. N. S. 633.

(d) *Pordage v. Cole*, 1 Will. Saunders, 548.

(e) 18 C. B. 573.

right to insist upon the performance of it, as, for example, where, after the time when the condition ought to have been performed, he accepts any benefit under the contract. As where goods on sale or return are kept an unreasonable time.

In cases where there was a condition precedent, it may often happen that, although the unperformed condition cannot be made available as a defence to the action, yet it may be treated as a warranty, for the breach of which a cross-action or counterclaim for damages might lie; but this is not invariably the case. To take Mr. Justice Blackburn's example in *The Calcutta Co. v. De Mattos* (a), the parties may agree that the price shall be payable only on the contingency of the goods arriving, or should not be payable unless a particular tree fall, but without any contract on the seller's part to procure the goods to arrive, or to cause the tree to fall. This branch of the subject will be treated at greater length in the chapter on the remedies of the parties (b).

Among the following cases will be found examples of conditions precedent, such as frequently occur, or are to be implied by law, in contracts of sale.

The cases will be considered in the following order:—
1st. As to payment; 2nd. As to quality and condition;
3rd. As to quantity; 4th. As to time; 5th. As to arrival and delivery; 6th. As to insurance and other conditions.

As to Payment (c).

In *Key v. Cotesworth* (d), in 1852, goods had been consigned by the plaintiffs to the defendants, and the bill of lading sent direct to them. At the same time a draft had been sent by the plaintiffs to their agents to be presented to the defendants for acceptance. The defendants obtained possession, but refused to accept, and the Court held that the passing of the property was not conditional on the acceptance.

(a) *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 322; 33 L. J. Q. B. 214.

(b) *Post*, p. 481.

(c) *See post*, p. 485.

(d) *Key v. Cotesworth*, 22 L. J. Ex. 4; 7 Ex. 595.

In *Godts v. Rose* (a), in 1855, the sale was of five tons of oil "to be free delivered and paid for in fourteen days." The sale was not of any specific oil, but the seller, who had oil answering the description lying at a wharf, gave authority to the wharfinger to transfer certain casks into the defendant's, the buyer's, name; and then sent a clerk with a transfer order to the defendant, and instructed the clerk to exchange it for a cheque. The defendant, having got possession of the transfer order, refused to give a cheque. The clerk then returned to the wharfinger and ordered him not to deliver the oil; but, notwithstanding this, the wharfinger did deliver it to the defendant, and the plaintiff brought trover. The Court held that the property had not passed. Willes, J., said: "The buyer takes the transfer order, but declines to give the cheque: he does not assent to the appropriation of the particular casks of oil as a fulfilment of the contract, upon the terms upon which alone the seller was content to make it" (b).

In *Shepherd v. Harrison* (c), in the House of Lords, in 1871, the plaintiff, who was a merchant in Manchester, instructed Paton, Nash and Co., of Pernambuco, to purchase for him cotton not exceeding 1,000 bales. For the purpose of carrying out the contract, Paton, Nash and Co. purchased 747 bales and consigned 547 of them to Liverpool, sending the bills of lading for the 547 bales, together with two bills drawn on the plaintiff, to their Liverpool correspondents, G. Paton and Co., by whom they were handed to the plaintiff, who accepted the bills and paid them at maturity. Paton, Nash and Co. subsequently shipped the remaining 200 bales in respect of which this case arose on board the defendants' ship, the *Olinda*, taking the bill of lading to order or assigns, and wrote to the plaintiff saying, "Enclosed please find invoice and bill of lading of 200 bales of cotton."

(a) *Godts v. Rose*, 25 L. J. C. P. 61; 17 C. B. 229.

(b) See also *Sheridan v. New Quay Co.*, ante, p. 166, 28 L. J. C. P. 58; 4 C. B. N. S. 618.

(c) *Shepherd v. Harrison*, 38 L. J. Q. B. 105 and 177; 40 L. J. Q. B. 148; L. R. 4 Q. B. 197 and 493; 5 E. & I. Ap. 116.

The invoice stated the cotton to be at the risk of the plaintiff. Paton, Nash and Co. did not, however, in fact, enclose the bill of lading to the plaintiff, but having endorsed it "Paton, Nash and Co.," sent it to G. Paton and Co., together with a draft for the plaintiff's acceptance. When G. Paton & Co. received the bill of lading and the draft they wrote to the plaintiff, "We beg to enclose bill of lading for 200 bales cotton shipped by Messrs. Paton, Nash and Co., *per Olinda*, s.s., on your account. We hand also their draft on your good selves for cost of the cotton, to which we beg your protection." The plaintiff retained the bill of lading, and returned the draft unaccepted. The defendants, the shipowners, on being indemnified by G. Paton and Co., refused to deliver up the cotton. The Court gave judgment for the defendants (a). Cockburn, C. J., said: "The cases are certainly very strong indeed, and conclusive to show, supposing the consignor of goods sends them to this country accompanied by bills of lading and bills of exchange which are to be accepted by the consignee of the goods as the consideration for the consignment, that where the consignor sends those documents direct to the consignee that ought to lead to the inference, and only properly lead to the inference, that he intended the consignee should have at once the disposal of the property and possession of the goods consigned; leaving to him, as a matter simply of obligation under the contract, to return the bills of exchange accepted, not as a condition precedent to the property vesting, but simply as a matter of contract. But, on the other hand, the authorities are equally good, to my mind, to show, where the consignor sends the bill of lading to an agent in this country to be by him handed over to the consignee, and accompanies that with bills of exchange to be accepted by the consignee, that that indicates a different intention, viz., that the handing over the bill of lading and the acceptance of the bill or bills of

(a) And this judgment was affirmed in the Exchequer Chamber, 38 L. J. Q. B. 177; L. R. 4 Q. B. 493; and in the House of Lords, 40 L. J. Q. B. 148; 5 E. & I. App. 116.

“exchange should be concurrent parts of one and the same transaction.”

It was contended for the plaintiff that he had been drawn on for a larger sum than was due for the price of the goods; but, said Kelly, C. B., “Possibly he was not bound to accept the bill. . . . But, at all events, he had no right to repudiate the contract in part: if he did not accept the bill, he could have no right to the goods.”

In the case of *Mirabita v. The Imperial Ottoman Bank* (a) in 1878, the plaintiff, a merchant carrying on business at Malta and Constantinople, agreed to purchase umber from Phatsea and Pappa, a firm of merchants at Larnaca. When Phatsea and Pappa had 600 tons ready for shipment they chartered a ship to carry the umber to London, taking the bills of lading “to order or assigns.” They then drew a bill on the plaintiff, which was discounted with the defendants’ agents at Larnaca, with the bill of lading attached. By a subsequent arrangement the defendants’ agents returned this bill of exchange, and a second was drawn by Phatsea and Pappa, on Mirabita Brothers, of London, in favour of Corkji, from whom they had purchased the umber. Corkji handed it to the defendants’ agents in substitution of the first one, with instructions to them to send it and the bills of lading to London, and there to deliver the bills of lading to Mirabita Brothers on payment of the bill of exchange at maturity. The defendants left the bill of exchange at the office of Mirabita Brothers attached to the following note: “Bill of lading . . . to be given up against the payment of attached draft.” F. Mirabita returned the bill of exchange without having accepted it, but stated that he would pay at maturity. The ship having arrived, the defendants had the cargo entered in their names; and on the same day, F. Mirabita called on the defendants and offered to pay the bill and receive the bills of lading, but the defendants refused to give them up, on the ground that they had taken possession of the cargo, and so made themselves

(a) *Mirabita v. The Imperial Ottoman Bank*, 47 L. J. Ex. 418; 3 Ex. D. 164. See also *Sale of Goods Act*, section 19 (1).

liable for freight. The defendants sold the umber. It was found, as a fact, that the intention was to pass the property on shipment to the plaintiff subject to a lien for the price. And although there was no contract between the plaintiff and the defendants, yet the Court held that the plaintiff could recover, as the bills of lading should have been handed to Mirabita Brothers on tender of payment of the bill of exchange.

In *The Mersey Steel and Iron Co. v. Naylor (a)*, in the House of Lords, in 1884, Naylor and Co. contracted to purchase 5,000 tons of steel from the Mersey Co., delivery 1,000 tons monthly, payment within three days after receipt of shipping documents. The Mersey Co. in the first month delivered only 332 tons, and delivered 260 tons in the early part of the next month. Before payment became due, a petition to wind up the Mersey Company was presented, and Naylor and Co. being advised (although wrongly) that under the Companies Acts they could not safely make any payments until the petition had been disposed of, declined to pay. The Mersey Co. then refused to make any further deliveries, and it was argued for them that the payment for each delivery was a condition precedent to the right to the next delivery, but both the Court of Appeal and the House of Lords held that it was not so.

By section 10 of the Sale of Goods Act it is provided that unless a different intention appears from the terms of the contract, stipulations as to *time* of payment are not deemed to be of the essence of a contract of sale (*b*). But it is to be noted that the section goes on to provide that it is a question depending on the terms of the contract whether any other stipulation as to time is of the essence of the contract. In mercantile transactions, it will be found, time is usually of the essence of the contract. In *Ryan v. Ridley (c)*, in 1902, where the defendant had contracted to buy certain perishable articles,

(a) *Mersey Steel and Iron Co. v. Naylor*, 51 L. J. Q. B. 576; 53 L. J. Q. B. 497; 9 Q. B. D. 648; 9 App. Ca. 434.

(b) *Martindale v. Smith* (1841), 1 Q. B. 389 at p. 395; *Bishop v. Shillito* (1829), 2 B. & Ald. 329.

(c) *Ryan v. Ridley*, 8 Com. Cas. 105.

payment to be made "by cash . . . in exchange for shipping "documents," it was held that he was under an obligation to pay within a reasonable time after the shipping documents were tendered to him, and if he did not do so, the seller was entitled to sell the goods against him and to recover the loss he had thereby suffered.

The general rule of law in regard to the relative obligations of the seller to deliver and of the buyer to pay the price is now laid down by section 28 of the Act, which provides that, unless otherwise agreed, delivery and payment are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

As to Quality and Condition.

Examples of conditions precedent as to quality have already been referred to (a) when speaking of sales on approval and by sample.

In *Lorymer v. Smith* (b), in 1882, the defendant, the buyer, had contracted to buy two parcels of wheat by sample, one parcel being 700 bushels, the other 1,400. The buyer called to inspect the wheat in bulk, and had the right to demand immediate delivery if he wished it; but the plaintiff would not allow him to see the larger parcel, although he allowed him to inspect the smaller. The defendant then declined to take any of the wheat. Some days afterwards, the plaintiff told the defendant he might inspect it, but the defendant declined, and obtained a verdict. The Court refused a new trial, Abbott, C. J., saying: "By the usage of the place, the "buyer had a right to inspect the wheat in bulk; which is "so reasonable, that without any such usage, the law would "give him that right."

(a) *Ante*, p. 209.

(b) *Lorymer v. Smith*, 1 B. & C. 1. See also *Howe v. Palmer*, in 1820, 3 B. & Ald. 321; *ante*, p. 30.

And in *Isherwood v. Whitmore* (a), in 1843, where the buyer refused to accept goods tendered to him in closed casks, which he was not allowed to open, Parke, B., said: "A tender of goods does not mean a delivery or offer of packages containing them, but an offer of those packages under such circumstances that the person who is to pay for the goods shall have an opportunity afforded him, before he is called on to part with his money, of seeing that those presented for his acceptance are in reality those for which he has bargained" (b).

In *Hutchinson v. Bowker* (c), in 1839, the defendants offered to sell good barley; the plaintiffs accepted the offer, but for fine barley; the defendants declined to deliver fine barley. The jury found good and fine meant different qualities in the trade, and it was held that there was no contract. There can be no doubt that if there had been a contract for fine barley, and good barley had been tendered, the buyer could not have been called on to accept it.

In *Pettitt v. Mitchell* (d), in 1842, the plaintiff, an auctioneer, sold by auction to the defendant a quantity of goods, to be paid for before delivery. The biddings were at so much per yard. The defendant refused to pay for the goods unless before doing so he was allowed to inspect and measure them. It was not denied that if it should turn out on measurement after payment that the defendant had been called upon to pay too much, he would be entitled to a return of part of the purchase-money, but his right to inspect before payment was contested, and the Court held that he had no such right. There were conditions of sale inconsistent with this supposed right, but Tindal, C. J., put his judgment on the broad ground of the inconvenience of implying such a condition.

The case of *Toulmin v. Hedley* (e), in 1845, was an action for the price of a cargo of guano which the defendant, the buyer, refused to accept, on the ground that it did not

(a) *Isherwood v. Whitmore*, 12 L. J. Ex. 318; 11 M. & W. 347.

(b) See Sale of Goods Act, s. 34 (2).

(c) *Hutchinson v. Bowker*, 5 M. & W. 535.

(d) *Pettitt v. Mitchell*, 12 L. J. C. P. 9; 4 M. & Gr. 819.

(e) *Toulmin v. Hedley*, 2 Car. & Kir. 157.

correspond with the warranty. The contract was for a cargo expected by the ship *Sarah* "quality warranted equal to "average imports from Ichaboe, and in sound and merchant-able condition." Cresswell, J., directing the jury, said: "It is true that this was a contract for a specific cargo; but "it had not been seen by the defendant; and I think, therefore, that before accepting it, he was entitled to look at it, "in order to see whether it corresponded with the terms of "the warranty or not; and that, if it did not, he was entitled "to reject it" (a).

In *Bull v. Robinson* (b), in 1854, the defendant refused to accept iron which was perfectly good when despatched from Staffordshire, on the ground that it was not in a merchantable condition. It had suffered a certain amount of deterioration by rusting on its way to Liverpool. The Court, on the motion for a new trial, was of opinion that if the deterioration was necessary and unavoidable, the defendant must accept.

In *Nichol v. Godts* (c), in 1854, the plaintiff had sold to the defendant "the five under-mentioned parcels of foreign "refined rape oil . . . warranted only equal to samples." The defendant accepted part of the oil, but refused to take the residue, on the ground that it was not foreign refined rape oil, but a mixture of hemp and rape oil. The samples consisted of rape oil adulterated with hemp oil, and the oil tendered corresponded with the samples, and on this ground the plaintiffs contended that the defendants were bound to accept the oil, although they admitted it was not foreign refined rape oil. The jury found that there was no usage in the trade that rape oil meant a mixture of rape and hemp oil, and found a verdict for the defendant, which the Court refused to disturb, on the ground that the thing tendered must answer the description of it in the contract as to its character. Parke, B., said, "The warranty affects only the quality, but "not the nature of the article itself."

(a) See Sale of Goods Act, s. 34 (1).

(b) *Bull v. Robinson*, 24 L. J. Ex. 165; 10 Ex. 342.

(c) *Nichol v. Godts*, 23 L. J. Ex. 314; 10 Ex. 191.

In *Wieler v. Schilizzi* (a), in 1856, the plaintiff had contracted to purchase from the defendant, and had accepted, a large quantity of Calcutta linseed, tale quale, at the date of the contract on board certain ships, and now brought this action for breach of an alleged warranty that the seed was Calcutta linseed whereas in fact it contained a large admixture of rape and mustard seed. The defendant denied any warranty. There was evidence that all linseed sent to this country contains about two or three per cent. of other seeds. But according to the plaintiff's evidence, the seed in question contained about fifteen per cent. The plaintiff had, however, sold it as linseed, and the buyers had used it as such. The question left to the jury was, whether there was such an admixture of foreign substances as to alter the distinctive character of the article and prevent it from answering the description of it in the contract—more, in truth, than might reasonably be expected. The jury returned a verdict for the plaintiff, and on the motion for a new trial the Court held that this was no misdirection. Willes, J., said, “The purchaser had a right to expect, not a perfect article, but an “article which would be saleable in the market as Calcutta “linseed. If he got an article so adulterated as not reasonably to answer that description, he did not get what he “bargained for.” Although the plaintiff chose to accept the seed, it seems clear that he might have refused to accept it had he chosen to do so.

Vernede v. Weber (b), in 1856, was an action by the buyer for non-delivery. The contract was for a cargo of 400 tons of Aracan Necrensie rice, with a proviso that the cargo might partly consist of Larong rice, but not to a greater extent than 50 tons. The defendant refused to deliver a cargo which consisted of 285 tons of Larong and 159 of Latourie, and no Aracan Necrensie, on the ground that it was not a cargo of Aracan Necrensie, and the Court said: “Unless the “cargo was what would substantially satisfy the description

(a) *Wieler v. Schilizzi*, 25 L. J. C. P. 89; 17 C. B. 619.

(b) *Vernede v. Weber*, 25 L. J. Ex. 326; 1 H. & N. 311.

“ of a cargo of Aracan Necrensie rice, we think that the
“ plaintiffs could not have been bound to accept it” . . .
“ and if the plaintiff would not have been bound to accept
“ the cargo brought, the defendant was not obliged to
“ deliver it, for the contract must be mutual and reciprocal.”

Bannerman v. White (a), in 1861, was an action brought to recover the price of hops delivered. The plaintiff, who was the seller, had alleged at the time of the sale that there was no sulphur in the hops, which in fact was not true, as sulphur had been used. It was admitted that the defendants would not have bought the hops if they had known that fact; and although the hops delivered corresponded with the sample, the Court held that the defendant might refuse to pay the price, on the ground that the stipulation that no sulphur had been used amounted to a condition that the hops might be rejected if sulphur had been used; it was the condition upon which the defendants contracted, and Erle, C. J., said: “ We
“ think that the intention appears that the contract should be
“ null if sulphur had been used.”

The case of *Josling v. Kingsford (b)*, in 1863, is a striking illustration of the distinction between a condition precedent and a warranty. The seller, who was the defendant, was sued in one count for not delivering oxalic acid according to contract, and in another count for breach of warranty.

Before making the contract, which was entered into by correspondence, a clerk of the plaintiff's, with the defendant, had examined both samples and the bulk of the oxalic acid, and considered it of good quality, and fit for the purpose for which it was wanted. In one of the defendant's letters to the plaintiff, he said: “ As regards the strength of the oxalic,
“ your friend having already examined the bulk, we decline a
“ responsibility in this respect.” The substance which was delivered was analysed and found to contain 10 per cent. of sulphate of magnesia, and it was proved that the presence of

(a) *Bannerman v. White*, 31 L. J. C. P. 28; 10 C. B. N. S. 844.

(b) *Josling v. Kingsford*, 32 L. J. C. P. 94; 13 C. B. N. S. 447; discussed in *Mody v. Gregson*, 38 L. J. Ex. 12; (1868), L. R. 4 Ex. 49 at p. 56.

this body could not be detected by mere inspection. The case was tried by Erle, C. J., who directed the jury that there was no evidence of any warranty, but that the defendant could only perform his part of the contract by delivering that which, in commercial language, might properly be said to come under the denomination of oxalic acid. The plaintiff then obtained a verdict. And on the motion for a new trial on the ground of misdirection which the Court refused to grant, holding the direction to have been the proper one, Williams, J., said: "However completely the defendant may "have guarded himself against contracting that the thing "was of any particular quality, it is not possible to construe "the contract in any other way than that it was a part of "the agreement that the subject of the sale should be the "oxalic acid of commerce."

Hopkins v. Hitchcock (a), in 1863, was an action against the buyer for refusing to accept certain iron bars. A firm of iron manufacturers, named Snowden and Hopkins, stamped the letters "S. & H.," with a crown, on the iron made by them. After Snowden retired from the business, Hopkins, who was the plaintiff, carried it on, stamping the same quality of iron "H. & Co.," with a crown. One Balls called on the plaintiff's agent, was informed that all iron was now so stamped, and communicated this to the defendant, who subsequently contracted to buy of the plaintiff 67 tons "'S. & H.' (crown) common bars"; the iron stamped "H. & "Co." (crown) was shipped and arrived at Hull, where the defendant, finding it rusty, declined to accept it, alleging that it was not stamped according to contract. The jury found that the "S. & H." was not material. The plaintiff obtained a verdict. On the motion the Court refused to disturb the verdict. Erle, C. J., said: "I think it is not a "contract for iron of a particular brand, but for iron of a "known quality, and that the plaintiff tendered the article "for which the defendant contracted."

In *Rylands v. Kreitman* (b), in 1865, the contract was to

(a) *Hopkins v. Hitchcock*, 32 L. J. C. P. 154; 14 C. B. N. S. 65.

(b) *Rylands v. Kreitman*, 19 C. B. N. S. 351.

deliver 500 piculs of cotton in the month of June. The plaintiffs tendered 287 bales by one ship and 20 bales by another. The defendants refused them, and the matter was referred to arbitrators, who found that the 287 bales and 5 out of the 20 bales were not in a merchantable condition. It was proved that in contracts like this the seller might deliver in several quantities. The jury found that the plaintiffs were at no time in the month of June able to deliver more than 15 bales. The Court sustained the verdict for the defendant. The report is not a very full one, but it would appear that if the plaintiffs had during the month of June, while there was still time to tender the rest, tendered the 15 merchantable bales, separated from the 5 unmerchantable ones, the result might have been different.

In *Morgan v. Gath* (a), in 1865, the contract was to deliver cotton in a merchantable condition, "the damaged, if any, to be rejected, provided it cannot be made merchantable." It was held that at all events the bulk must be in a merchantable condition when tendered, and that it was not sufficient that it might be made merchantable.

In *Nicholson v. Bradfield Union* (b), in 1866, the defendants had ordered 70 tons of Ruabon coals. The plaintiff delivered one parcel of 15 tons of Ruabon coals, and the next day a parcel of 7 tons which were not Ruabon coals. He shot the second parcel on to the first. About 6 tons were consumed before the inferiority was discovered. The Court held that the defendants could not be called upon to pay for the unconsumed remainder.

Azmar v. Casella (c), in 1867, was an action against the buyers for not accepting certain cotton. The facts as appearing in a special case were that De Souza and Co., of Madras, had consigned to the plaintiff 128 bales of cotton marked $\frac{D.C.}{C.}$, sending a sample at the same time, but by over-

(a) *Morgan v. Gath*, 34 L. J. Ex. 165; 3 H. & C. 748.

(b) *Nicholson v. Bradfield Union*, 35 L. J. Q. B. 176; L. R. 1 Q. B. 620; 7 B. & S. 747.

(c) *Azmar v. Casella*, 36 L. J. C. P. 124; 36 L. J. C. P. 263; L. R. 2 C. P. 431; L. R. 2 C. P. 677.

land route. The sample was "Long Staple Salem" cotton, and was handed by the plaintiffs to the broker. The defendants examined the sample, and purchased the cotton, the broker's note being in the following terms: "Sold by order and for account of Messrs. J. C. Azémar and Co. to Messrs. A. Casella and Co. the following cotton, viz., $\frac{D.C.}{C.}$ 128 bales at 25*d.* per lb., expected to arrive in London, per *Cheviot*, from Madras. The cotton guaranteed equal to scaled sample in our possession. Should the quality prove inferior to the guarantee, a fair allowance to be made." The cotton turned out to be a particularly good sample of Western Madras, and not Long Staple Salem, and was therefore not in accordance with the sample, and the defendants rejected it. It was proved that these two cottons required different machinery in their manufacture. It was contended for the plaintiff that this was a sale of specific bales of cotton, with a warranty superadded that it should be equal in quality to the sample, and that it was not a sale subject to a condition that the cotton should be Long Staple Salem. But Willes, J., in delivering judgment for the defendants, said the property had not passed to them, and held that this was not a mere difference in value to be compensated for under the allowance clause, but an essential difference in the species, so that the contract was for one thing, and the article tendered another. And this judgment was affirmed by Martin, B., Blackburn, J., Channell and Pigott, BB., and Shee, J., in the Exchequer Chamber (*a*).

In *Smith v. Hughes* (*b*), in 1871, the plaintiff offered to sell to the defendant 16 qrs. of oats, showing him a sample of them. There was a conflict of evidence as to what had taken place at the sale, the defendant saying that the plaintiff had offered old oats, the plaintiff denying that the word "old" had been used. The plaintiff delivered the oats, and when the defendant discovered they were new, he requested the plaintiff to take them back again, which he declined to do. The plaintiff then brought this action for the price.

(*a*) *Azémar v. Casella*, 36 L. J. C. P. 124 and 263; L. R. 2 C. P. 431 and 677.

(*b*) *Smith v. Hughes*, 40 L. J. Q. B. 221; L. R. 6 Q. B. 597.

There were two questions to be decided in this case; the first was whether the word "old" had been used, for if so it was a condition precedent to the buyer's obligation to receive the oats that they should be old; and the second question was whether there was any contract at all. On this point the case has already been noticed.

In *Heilbutt v. Hickson* (a), in 1872, there was a sale by sample—the sample itself containing a hidden defect. The plaintiffs in London had contracted to purchase 30,000 pairs of shoes equal to sample from the defendants in Northampton for the use of the French army. The defendants delivered parcels of shoes at Fenning's Wharf in London, and, on cutting some of them open, it was found that some contained paper in the soles. The defendants then wrote a letter to the plaintiffs, agreeing to take back those shoes which should be rejected in consequence of their containing paper. The defendants then delivered other parcels, making in all 12,825 pairs, which were inspected by the plaintiffs and paid for, and 12,225 of these were then sent over to Lille, where they were rejected by the French Government, as they were found to contain paper fillings in the soles. The plaintiffs then declined to receive any more shoes, and requested the defendants to take the shoes already delivered and to return the purchase-money. The defendants offered to take back all those which contained paper, but this could only be ascertained by cutting them open. The sample shoe was cut open, and it was found to contain paper in the sole. At the trial the jury found that both the shoes delivered and those ready for delivery were not equal to sample, and that the defects could not have been discovered by any inspection which ought reasonably to have been made by the plaintiffs. The defendants contended that the plaintiffs had accepted the shoes, and could not now return them, and that the plaintiffs' remedy was damages for breach of warranty. But the Court, consisting of Bovill, C. J., Byles and Brett, JJ., held that the

(a) *Heilbutt v. Hickson*, 41 L. J. C. P. 228; L. R. 7 C. P. 438; considered, *Drummond v. Van Ingen*, 56 L. J. Q. B. 563; (1887), 12 App. Ca. 284, at p. 299.

plaintiffs were entitled to recover the loss of profit on the whole 30,000 pairs which would have accrued to them if the shoes had been accepted by the French Government, as well as the price already paid to the defendants, and that the plaintiffs were entitled to throw back on the defendants' hands the whole of the shoes at Lille, as well as those which had been delivered at Fenning's Wharf and not forwarded to Lille. Referring to the alleged acceptance of the shoes by the plaintiffs after the inspection in London, Brett, J., said: "The defect, though known to the defendants' servants, was "a secret defect, not discoverable by any reasonable exercise "of care or skill on an inspection in London. By the "necessary inefficacy of the inspection in London—an in- "efficacy caused by this kind of fault, viz., a secret defect of "manufacture which the defendants' servants committed— "the apparent inspection in London could be of no more "practical effect than no inspection at all; . . . the real "inspection at Lille being by the acts of the defendants' "servants the first possibly effective inspection, it seems to "me that such inspection was, by the acts of the persons for "whose acts the defendants were responsible, substituted for "the first inspection stipulated for by the contract "(a).

The general rule of the common law in regard to quality under a contract of sale is expressed by the maxim *caveat emptor*. Except in cases of fraud, the buyer purchases at his own risk unless there has been a condition or warranty, either express or to be implied from the circumstances of the sale. The rules relating to implied conditions are to be found in section 14 of the Sale of Goods Act, which provides:—

"(1.) Where the buyer, expressly or by implication, makes "known to the seller the particular purpose for which the "goods are required, so as to show that the buyer relies on the "seller's skill or judgment and the goods are of a description "which it is in the course of the seller's business to supply "(whether he be the manufacturer or not), there is an implied "condition that the goods shall be reasonably fit for such

(a) For a sale of goods "with all faults," see *Ward v. Hobbs*, 4 App. Ca. 13.

“purpose, provided that in the case of a contract for the sale
 “of a specified article under its patent or other trade name,
 “there is no implied condition as to its fitness for any particular
 “purpose :

“(2.) Where goods are bought by description from a seller
 “who deals in goods of that description (whether he be the
 “manufacturer or not) there is an implied condition that the
 “goods shall be of merchantable quality : provided that if the
 “buyer has examined the goods, there shall be no implied con-
 “dition as regards defects which such examination ought to
 “have revealed :

“(3.) An implied warranty or condition as to quality or
 “fitness for a particular purpose may be annexed by the usage
 “of trade.

“(4.) An express warranty or condition does not negative a
 “warranty or condition implied by this Act unless inconsistent
 “therewith.”

+ This section supplies the exception to the maxim *caveat emptor*. In *Brown v. Edgington* (a), in 1841, Erskine, J., stated : “When a party undertakes to supply an article for
 “any particular purpose, he warrants that it shall be fit and
 “proper for such purpose. If a purchaser himself selects the
 “article, it has been held that the mere fact that the vendor
 “knew the use for which it was designed will not raise an
 “implied warranty, because the skill and judgment of the
 “latter are not relied on in making the purchase” (b).

In *Chanter v. Hopkins* (c), in 1838, the defendant sent the plaintiff a written order as follows :—“Send me your patent
 “hopper and apparatus, to fit up my brewing copper with
 “your smoke-consuming furnace.” The plaintiff accordingly
 furnished the desired article, but it was found to be useless
 for the purposes of a brewery, and the defendant refused to
 accept it. In an action for the price, it was held that there

(a) *Brown v. Edgington*, 2 M. & G. 279.

(b) See *Randall v. Newsom* (1877), 2 Q. B. D. 109; *Jones v. Bright* (1829), 5 Bing. 533; *Shepherd v. Pybus* (1842), 3 M. & G. 868; *Drummond v. Van Ingen*, 56 L. J. Q. B. 563; (1887), 12 App. Ca. 284.

(c) *Chanter v. Hopkins*, 4 M. & W. 399.

was no implied warranty (or condition) on the part of the plaintiff that the furnace supplied should be fit for the purposes of a brewery, and that, the defendant having defined by the order the particular machine to be supplied, the plaintiff had performed his part of the contract by supplying that machine.

In *Gardiner v. Gray* (a), in 1815, the plaintiff purchased 12 bags of waste silk from the defendant. The silk was found to be of a quality not saleable under the denomination of "waste silk." Lord Ellenborough, in delivering judgment, said that, in the absence of any particular warranty, it was an implied term of every such contract that the purchaser should receive a saleable article answering the description in the contract, and that where there was no opportunity of inspecting the commodity, the maxim *caveat emptor* did not apply. Where, however, the seller undertakes to supply goods of his own manufacture, or goods in which he deals, which the buyer has not had the opportunity of inspecting, the buyer is presumed to be buying on the strength of the seller's judgment, because he only orders goods of a class, and the seller must be presumed to have a special knowledge of such goods (b).

In sales by sample, as has been indicated (c), no property will pass unless and until certain conditions have been fulfilled. This subject is dealt with by section 15 of the Sale of Goods Act, which is as follows :—

"(1.) A contract of sale is a contract for sale by sample where "there is a term in the contract, express or implied, to that effect.

"(2.) In the case of a contract for sale by sample—

"(a) There is an implied condition that the bulk shall "correspond with the sample in quality :

"(b) There is an implied condition that the buyer shall "have a reasonable opportunity of comparing the "bulk with the sample (d) :

(a) *Gardiner v. Gray*, 4 Camp. 144.

(b) *Jones v. Just*, 37 L. J. Q. B. 89 ; L. R. 3 Q. B. 197.

(c) *Ante*, p. 209.

(d) *Lorymer v. Smith* (1822), 1 B. & C. 1 ; *Heilbutt v. Hickson*, 41 L. J. C. P.

“(c) There is an implied condition that the goods shall be
 “free from any defect, rendering them unmerchant-
 “able, which would not be apparent on reasonable
 “examination of the sample” (a).

In *Polenghi v. Dried Milk Co.* (b), in 1904, there was a provision in a contract of sale by sample in these terms, “payment to be made in cash in London on the arrival of the” goods “against shipping or railway documents,” and the question was whether, in view of that clause, the buyers were entitled, as a condition precedent to payment of the price, to have an opportunity of comparing the bulk with the sample. It was held by Kennedy, J., that by the express term of the contract the buyers were bound to pay on arrival of the goods and production of the documents, although they would still have the right to reject if, on subsequent examination, it was found that the bulk did not correspond with the sample.

In certain cases (c) if the buyer does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, and if no time has been fixed, on the expiration of a reasonable time (which is a question of fact), the property passes to the buyer.

In regard to sales by description, section 13 of the Sale of Goods Act provides that there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

228; (1872), L. R. 7 C. P. 438; but cf. *Heyworth v. Hutchinson*, 36 L. J. Q. B. 270; (1867), L. R. 2 Q. B. 47; *Polenghi v. Dried Milk Co.* (1904), 10 Com. Cas. 42.

(a) *Heilbutt v. Hickson*, *supra*; *Mody v. Gregson*, 38 L. J. Ex. 12; (1868), L. R. 4 Ex. 49; *Drummond v. Van Ingen*, 56 L. J. Q. B. 563; (1887), 12 App. Ca. 284.

(b) *Polenghi v. Dried Milk Co.* (1904), 10 Com. Cas. 42.

(c) Sale of Goods Act, s. 18, rule 4; see *Beverley v. Lincoln Gas Light Co.*, in 1837, 6 Ad. & El. 829; *Moss v. Sweet*, in 1851, 20 L. J. Q. B. 167; 16 Q. B. 493; *Ray v. Barker*, in 1879, 48 L. J. Ex. 569; L. R. 4 Ex. D. 279; *Couston v. Chapman*, in 1872, L. R. 2 Sc. Ap. 250; *Sanders v. Jameson*, in 1848, 2 Car. & Kir. 537; *Re Walkers and Shaw*, 73 L. J. K. B. 325; [1904] 2 K. B. 152, on custom in such cases; and Sale of Goods Act, s. 35.

The implication must be a necessary implication, and not merely a reasonable one (a).

In *Varley v. Whipp* (b), in 1900, the plaintiff agreed to sell and the defendant to buy a reaping machine which the defendant had never seen, and which was stated by the plaintiff to have been new the previous year and used to cut only fifty or sixty acres. After delivery the defendant complained that it did not correspond with the plaintiff's statements, and he accordingly returned it. In an action by the plaintiff to recover the price it was held that the contract was one for a sale by description within the meaning of section 13, and that there was an implied condition that the machine should correspond with the description.

In *Vigers v. Sanderson* (c), in 1901, the plaintiffs sold to the defendants certain parcels of sawn laths, to be of "about" the specification mentioned in the contract: 33 per cent. of the laths shipped under the contract were not of "about" the specification, nor commercially within its meaning, and it was held by Bigham, J., that the defendants were entitled to reject the whole consignment.

In *Gillespie v. Cheney* (d), in 1896, coals were supplied under a written contract of sale which contained no mention of the particular purpose for which they were required, viz., bunkering, although prior to the contract the buyers made known to the sellers, who were coal agents, that purpose. It was held that evidence of what took place between the parties prior to the contract was admissible to raise the implication of the condition specified in section 14 of the Act, and that there was an implied condition that the coals were reasonably fit for bunkering, the purpose for which they were required. It was also held in this case that a contract for the sale of coals under a particular description known in the coal trade was not a contract for the sale of a specified article

(a) Per Esher, M. R., in *Hamlyn v. Wood*, in 1891, 60 L. J. Q. B. 734; 2 Q. B. 488, at p. 491.

(b) *Varley v. Whipp*, 69 L. J. Q. B. 333; [1900] 1 Q. B. 513.

(c) *Vigers v. Sanderson*, 70 L. J. K. B. 383; (1901), 6 Com. Cas. 99.

(d) *Gillespie v. Cheney*, 56 L. J. Q. B. 552; [1896] 2 Q. B. 59.

under its patent or other trade name within the meaning of the proviso in section 14 (1) (a).

In *Priest v. Last* (b), in 1903, the plaintiff went to a chemist's shop and asked for a hot-water bottle, and was shown a bottle which, the defendant said, would not stand boiling water, but was meant for hot water. The plaintiff purchased it, and some days afterwards, when it was being used by his wife, it burst, and she was scalded. At the trial the Judge found that the plaintiff had, when purchasing the bottle, sufficiently made known to the defendant the particular purpose for which it was required, so as to show that he relied on the skill and knowledge of the defendant, and that, in consequence, there was an implied condition (or warranty) that the bottle was fit for the purpose of holding hot water.

In *Frost v. The Aylesbury Dairy Co., Ltd.* (c), in 1905, the defendants, who were milk dealers, supplied the plaintiff with milk, together with a printed statement that the milk was free from the germs of disease. The milk supplied contained typhoid germs, in consequence whereof the plaintiff's wife was infected and died. The plaintiff brought his action upon an implied condition or warranty, under section 14 (1) of the Sale of Goods Act, to recover the expenses to which he had been put by reason of the illness and death of his wife, and it was held that the purpose for which the milk was supplied was sufficiently made known to the sellers by its description: that there was evidence that the buyer relied on the sellers' skill, and that there was an implied condition, under the Act, that the milk was reasonably fit for consumption, although the defects were not discoverable at the time of sale.

In *Wren v. Holt* (d), in 1903, where the plaintiff went into a beer-house, which he knew to be tied to certain brewers,

(a) "Provided that in the case of a contract for the sale of a specified article "under its patent or other trade name, there is no implied condition as to its "fitness for any particular purpose": and see *Chanter v. Hopkins*, 4 M. & W. 399; and *Ollivant v. Bayley* (1843), 13 L. J. Q. B. 34; 5 Q. B. 288.

(b) *Priest v. Last*, 72 L. J. K. B. 657; [1903] 2 K. B. 148.

(c) *Frost v. The Aylesbury Dairy Co., Ltd.*, 74 L. J. K. B. 386; [1905] 1 K. B. 608.

(d) *Wren v. Holt*, 72 L. J. K. B. 340; [1903] 1 K. B. 610.

and was supplied with beer contaminated with arsenic, it was held that this was a breach of warranty under section 14, sub-section (2), of the Sale of Goods Act (a).

In *Clarke v. The Army and Navy Stores, Ltd.* (b), in 1903, the plaintiff bought a tin of disinfecting powder which the seller knew was dangerous to open unless special precautions were taken. It was held, in an action by the buyer for damages for injury caused to him by the opening of the tin, that apart from any condition or warranty it was the duty of the seller to warn the buyer of the possible danger, and that in the absence of such warning the seller was liable in damages.

As to Quantity.

The law as to quantity is contained in section 30 of the Sale of Goods Act, which provides as follows:—

“(1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered, he must pay for them at the contract rate.

“(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

“(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

“(4.) The provisions of this section are subject to any usage

(a) Sub-section (2).—“Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality: . . .”

(b) *Clarke v. The Army and Navy Stores, Ltd.*, 72 L. J. K. B. 153; [1903] 1 K. B. 155; cf. *George v. Skivington* (1869), L. R. 5 Ex. 1. See also section 62 (2) of the Sale of Goods Act.

“of trade, special agreement, or course of dealing between the parties.”

The following are some of the more important cases upon which the provisions of the Act are founded.

In *Waddington v. Oliver* (a), in 1805, the plaintiff agreed to sell the defendant 100 bags of hops, to be delivered on or before the 1st of January, as might be agreeable to the plaintiff. He delivered twelve bags on the 12th of December, and demanded payment, and was refused, and commenced his action on the following day. The Court upheld the nonsuit, being of opinion that he could not demand the price until he had delivered the whole.

In *Cross v. Eglin* (b), in 1831, the contract was for 300 qrs. of rye “more or less.” The seller tendered 345 qrs., and the Court held that was more than was meant by “more or less.”

In *Cunliffe v. Harrison* (c), in 1851, the defendants, wine merchants at Liverpool, had ordered ten hogsheads of claret from the plaintiff, a wine merchant at Bordeaux. The plaintiff sent fifteen hogsheads, and the defendants then wrote that they had ordered ten and would take that number only, provided they proved satisfactory. They subsequently tasted the claret and disapproved of it, and after some months' delay gave notice to the plaintiff that they would not accept any of the wine. The Court on the motion ordered a nonsuit to be entered, Parke, B., saying, “If ten only had been delivered, and they (the defendants) had forborne to take any objection for three or four months, that would have been sufficient evidence that they approved of the quality of the wine. . . . But the delivery of fifteen hogsheads, under a contract to deliver ten, is no performance of that contract, for the person to whom they are sent cannot tell which are the ten that are to be his. . . . The delivery of more than ten is a proposal for a new contract.”

(a) *Waddington v. Oliver*, 2 B. & P. N. R. 61.

(b) *Cross v. Eglin*, 2 B. & Ad. 106.

(c) *Cunliffe v. Harrison*, 20 L. J. Ex. 325; 6 Ex. 903.

In the note there are several cases similar to *Cunliffe v. Harrison* (a).

In *Moore v. Campbell* (b), in 1854, the defendant had contracted to sell to the plaintiff 100 tons of hemp, part of which was to arrive by the *George Green*. The hemp was warehoused, and delivery orders were signed by the warehousemen for "about" fifty-two tons. The plaintiff refused to take the delivery orders in that form. The defendant resold the hemp. The Court held that evidence to show that the usage among brokers was to give delivery orders in this form should have been admitted (c). This is an instance of the application of a trade usage, as provided in sub-section (4) of the Act.

In *Bourne v. Seymour* (d), in 1855, the defendant contracted to sell to the plaintiff "about 500 tons of nitrate of soda." The contract contained this clause, "It is understood that the "above nitrate of soda is to form the full and complete cargo "of the *John Phillips*, 345 tons register," and a clause that if the *John Phillips* could not be made available from any cause, then the defendant was to deliver "another cargo or "cargoes of about equal quantity." The defendant delivered a full cargo by the *John Phillips*, but it fell considerably short of 500 tons. The Court held that the plaintiff was entitled to recover, as this was an absolute contract to deliver

(a) *Cunliffe v. Harrison*, 20 L. J. Ex. 325; 6 Ex. 903; *Hart v. Mills*, in 1846, 15 L. J. Ex. 200; 15 M. & W. 85; *Richardson v. Dunn*, in 1841, 2 Q. B. 218; *Dixon v. Fletcher*, in 1837, 3 M. & W. 146; *Oxendule v. Wetherell*, in 1829, 9 B. & C. 386; approved in *Colonial Insurance Co. v. Adelaide Insurance Co.*, 56 L. J. P. C. 19; (1886), 12 App. Ca. at p. 138; *Rylands v. Kreitman*, 19 C. B. N. S. 351.

(b) *Moore v. Campbell*, 23 L. J. Ex. 310; 10 Ex. 323.

(c) In *Gwillim v. Daniel*, 2 C. M. & R. 61, the word "say" was construed as "which we estimate at."

In *Leeming v. Snaith*, in 1851, 20 L. J. Q. B. 164; 16 Q. B. 275, the words "say not less than" were held to be not mere words of expectation showing what the parties supposed the quantity would prove to be, but amounted to a contract to deliver at least that quantity. In *McConnell v. Murphy*, in 1873, L. R. 5 P. C. 203, the words "say about" were held to be words indicating that the amount was expected to be, not warranted to be, a certain amount. In *Morris v. Levison*, in 1876, 45 L. J. C. P. 409; 1 C. P. D. 155, "say about "1,100 tons" were held not to be words of expectation, but a contract to deliver that amount.

(d) *Bourne v. Seymour*, 24 L. J. C. P. 202; 16 C. B. 337.

500 tons, and was not conditional on the vessel named holding that quantity (a).

In *Gorriessen v. Perrin* (b), in 1857, where the defendant tendered bales of gambier which were only of about one-third of the weight of what were known in the market as bales, the plaintiff succeeded in an action brought for non-delivery of "bales."

In *Hoare v. Rennie* (c), in 1859, which was an action for not accepting, the plaintiffs contracted in April to deliver to the defendants 667 tons of Swedish iron to be shipped from Sweden in about equal quantities in each of the months of June, July, August, and September. In the month of June the plaintiffs shipped only about 21 tons. The defendants declined to accept the 21 tons, and refused to receive the residue of the iron. The defendants demurred, and in delivering judgment for them Pollock, C. B., said, "The only question we have to deal with is whether, on a contract like this, if the sellers at the outset send a less quantity than they are bound to send, so as to begin with a breach, they can compel the purchasers to accept and pay for the sending of that which was a breach and not a performance of the agreement," . . . and after referring to what might possibly have been the case if the defendants had received a portion and then refused the remainder, continued, "Where parties have made an agreement for themselves, the Courts ought not to make another for them. Here they say that one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset the plaintiffs failed to tender the quantity according to the contract: they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract; and they were no more bound to accept the short quantity than if a single delivery had been contracted for." Watson and Channell, BB., were of the same opinion. It is

(a) See also *Morris v. Levison*, 45 L. J. C. P. 409; 1 C. P. D. 155.

(b) *Gorriessen v. Perrin*, 27 L. J. C. P. 29; 2 C. B. N. S. 681.

(c) *Hoare v. Rennie*, 29 L. J. Ex. 73; 5 H. & N. 19.

very doubtful, however, whether this can be considered good law now, notwithstanding the remarks of Bramwell, L. J., in delivering his judgment in *Honck v. Muller* (a), where he said it had been supposed that *Hoare v. Rennie* (b) had been overruled by *Simpson v. Crippin* (c), but that it was not so.

The cases on this point are difficult to reconcile, but the true principle appears to be that each case must be judged on its own merits (d). In *Mersey Steel Co. v. Naylor* (e) Lord Blackburn said: "The rule of law is that where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, it is a good defence to say, 'I am not going on to perform my part of it when that which is the rule of the whole and the substantial consideration for my performance is defeated by your misconduct.'"

In the case of *Tamvaco v. Lucas* (f), in 1859, the defendants were brokers *del credere*, and contracted for their principal, Dart, to purchase from the plaintiffs a cargo of "about 2,000 qrs., say from 1,800 to 2,200 qrs.," of wheat, "sellers guarantee delivery of invoice weight; buyers to pay for any excess of weight, unless it be the result of sea damage or heating," payment cash in exchange for the usual shipping documents. The bill of lading was for 2,215 qrs., and Dart refused to accept it. The invoice was for an amount not exceeding 2,200 qrs. The declaration stated that the plaintiffs were ready to deliver the shipping documents in exchange for the invoice price, so that the defendants were not to be charged more than they had contracted to pay. The Court held that, if there had actually been 2,215 qrs. on board, Dart would have been justified in refusing to accept, and so, if the usual shipping documents

(a) *Honck v. Muller*, 50 L. J. Q. B. 529; 7 Q. B. D. 100.

(b) *Hoare v. Rennie*, 29 L. J. Ex. 73; 5 H. & N. 19.

(c) *Simpson v. Crippin*, 42 L. J. Q. B. 28; L. R. 8 Q. B. 14.

(d) Chalmers' Sale of Goods Act, 6th ed., p. 74.

(e) *Mersey Steel Co. v. Naylor* (1884), 53 L. J. Q. B. 497; 9 App. Ca. 434, at p. 443.

(f) *Tamvaco v. Lucas*, 28 L. J. Q. B. 150; 1 E. & E. 581.

represented the cargo to be more than 2,200 qrs., Dart might refuse to accept, and could not be made liable by proof that in fact the cargo was not more than 2,200 qrs. The words of the contract, "Buyers to pay for any excess of "weight," most probably referred to any actual excess over the invoice weight, and are consistent with the rest of the contract, that the quantity was not to exceed 2,000 qrs.

In a second case of *Tamvaco v. Lucas* (a), in 1859, the contract was the same as in the first case. The shipping documents showed on the face of them a quantity within the prescribed limits, but the amount actually shipped was below, and it was held that the buyer was not bound to accept.

In *Simpson v. Crippin* (b), in 1872, the buyers brought an action for damages against the sellers for not delivering coal. The contract, dated 10th June, was to purchase about 6,000 to 8,000 tons of coal, delivery to commence on 1st July, in about equal monthly instalments over the next twelve months, into the buyers' wagons at the sellers' collieries. On the 8th July the defendants complained that no wagons had been sent; this was followed by further complaints, and eventually only 158 tons were taken during that month. On the 1st of August the defendants wrote to cancel the contract, saying that their sole inducement to contract was the regular and punctual withdrawal by the plaintiffs of the stipulated quantity during the summer months. Blackburn and Lush, JJ., held that the defendants were not entitled to cancel the contract; Mellor, J., was of the opposite opinion, holding that the case was governed by *Hoare v. Rennie* (c).

These cases of conditions precedent as to quantity may be contrasted with the case of *Covas v. Bingham* (d), where the contract was to buy a specific cargo believed to consist of a certain amount, whatever the amount might turn out to be in fact, and with the same class of case as *Johnston v. Kershaw* (e),

(a) *Tamvaco v. Lucas*, 28 L. J. Q. B. 301; 1 E. & E. 592.

(b) *Simpson v. Crippin*, 42 L. J. Q. B. 28; L. R. 8 Q. B. 14.

(c) *Hoare v. Rennie*, 29 L. J. Ex. 73; 5 H. & N. 19.

(d) *Covas v. Bingham*, 23 L. J. Q. B. 26; 2 E. & B. 836.

(e) *Johnston v. Kershaw*, 36 L. J. Ex. 44; L. R. 2 Ex. 82.

in which the defendant was held bound to accept a different quantity to that mentioned in the contract, on the ground that the plaintiff was the buyer's agent, and in consigning a different quantity was acting within the scope of his instructions.

In *Johnston v. Kershaw* (a), in 1867, there was an order from a Liverpool merchant to merchants at Pernambuco to purchase 100 bales of cotton and to ship them to Liverpool. The plaintiff purchased and shipped 94 bales only, and recovered their price. The Court treated the case, and no doubt correctly, as one of instructions from a principal to an agent. Channell, B., said, "I am of opinion that this order must not be taken as an order to buy 100 specific bales of cotton at one time, but that the plaintiff by purchasing 94 bales has executed it with due and reasonable diligence."

Ireland v. Livingstone (b) was also an action for not accepting. The case was first heard in the Queen's Bench in 1866 where the plaintiffs obtained judgment, which was reversed in the Exchequer Chamber in 1870; and the Exchequer Chamber was reversed in the House of Lords in 1872. The defendant, who was a merchant in Liverpool, had given an order for sugar to the plaintiffs, who were commission merchants in the Mauritius, in the following terms: "My opinion is, that should the beet crop prove less than usual, there may be a good chance of something being made by importing cane sugar at about the limit I am going to give you as a maximum, say, 26s. 9d. for Nos. 10 and 12, and you may ship me 500 tons, to cover cost, freight, and insurance; 50 tons more or less of no moment, if it enables you to get a suitable vessel; you will please to provide insurance, and draw on me for the cost thereof as customary, attaching documents, and I engage to give same due protection on presentation. I should prefer the option of sending vessel to London, Liverpool, or the Clyde; but if that is not compassable, you may ship to either Liverpool

(a) *Johnston v. Kershaw*, 36 L. J. Ex. 44; L. R. 2 Ex. 82.

(b) *Ireland v. Livingstone*, 36 L. J. Q. B. 50; 39 L. J. Q. B. 282; 41 L. J. Q. B. 201; L. R. 2 Q. B. 99; L. R. 5 Q. B. 516; 5 E. & I. Ap. 395.

“or London.” When the plaintiffs received this letter prices and freights were above the limits mentioned by the defendant, but subsequently (*viz.*, on 22nd or 23rd Sept.), prices having fallen, the plaintiffs purchased from several brokers fourteen distinct lots of sugar, amounting to 393 tons, and consigned them to the defendant by a ship having on board a large quantity of sugar for other consignees. The plaintiffs continued to watch the market in the Mauritius, intending to complete the purchase of the full 500 tons, but before they were able to purchase any more the defendant countermanded the order, and, on the 393 tons arriving in England, refused to accept them on the grounds that he had contracted to purchase 500 tons, 50 tons more or less, and was entitled to refuse 393, and, relying on *Kreuger v. Blanck (a)*, that the contract was for the purchase of a cargo of 500 tons, to be consigned in a ship which was to call for orders, whereas the plaintiffs had not sent a cargo, nor in such a ship. The plaintiffs sold the sugar and brought this action for the difference. They contended that this was in fact a contract between principal and agent, and that they had a right to say, “We have been buying under your authority 393 tons, and have appropriated them to you, and would have completed the order if you had not stopped us”; or, as Shee, J., put it, “it was an order to purchase up to 500 tons” (*b*); and the House of Lords sustained this view. Lord Blackburn said (*c*): “My opinion is, that when the order was accepted by the plaintiffs there was a contract of agency by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property at the actual cost, with the addition of the commission; but that this super-added sale is not in any way inconsistent with the contract of agency existing between the parties, by virtue of which the plaintiffs were under the obligation to make reasonable exertions to procure the goods ordered as much below the

(a) *Kreuger v. Blanck*, 39 L. J. Ex. 160; L. R. 5 Ex. 179.

(b) L. R. 2 Q. B. 107.

(c) 41 L. J. Q. B. 205; L. R. 5 E. & I. Ap. 409.

“limit as they could” (a). This case may be contrasted with *Ex parte White, In re Nevill* (b), where the contention was that a consignee was an agent, when in fact he was a principal.

In *Reuter v. Sala* (c), in 1879, the action was to recover damages for the non-acceptance of 25 tons (more or less) of Penang pepper, October ^{and}_{or} November shipment from Penang to London. The name of the vessel, marks, and full particulars to be declared to the buyer within 60 days from date of bill of lading. On the 19th of January the plaintiffs declared 25 tons, of which 20 only were of November shipment; and the defendants declined to accept, on the ground that it was not the full quantity of November shipment. Subsequently, on the 5th of February, the plaintiffs again declared the 20 tons, together with 5 more tons, all of November shipment, but as to these 5 tons the tender was more than 60 days from the date of the bill of lading, and the defendants again refused to take the pepper. The question was whether the plaintiffs could maintain the action in respect of the 20 tons. Lord Coleridge, C. J., who tried the case without a jury, directed judgment to be entered for the defendants. On appeal, Thesiger and Cotton, L. JJ., were of opinion they could not; Thesiger, L. J., saying, “The subject “of the contract is the sale of a specific quantity of a given “article, with a margin for a moderate excess in or diminution of that quantity under the words ‘about’ and ‘more “‘or less.’ The rule applicable to such a contract, if it “were not qualified by other provisions, would be that, “subject to the moderate margin, the sellers cannot call “upon the buyers to accept any greater or less quantity of “the article bargained for than the specified quantity. In “the present case, if the 5 tons shipped or declared too late “be excluded, the diminution in quantity is clearly beyond

(a) In delivering judgment in this case, Lord Blackburn showed, with great clearness, the position of an agent consigning to a principal at a price to cover cost, freight, and insurance: 41 L. J. Q. B. 204; 5 E. & I. Ap. 406.

(b) *Ex parte White, In re Nevill*, in 1870, 40 L. J. Bank. 73; 6 Ch. Ap. 397.

(c) *Reuter v. Sala*, 48 L. J. C. P. 492; 4 C. P. D. 239.

"the margin." Brett, L. J., differed, being of opinion that the plaintiffs were entitled to recover in respect of the 20 tons, leaving the defendants to a cross-action in respect of the 5 tons (a).

In the case of *Englehart v. Bosanquet* (b) it was held that, on a sale of 2,000 tons of sugar to come in two ships, when the sugar by the first ship was not equal to contract, the buyer was not bound to take the other.

In *Kreuger v. Blanck* (c), in 1870, the order was for a "small cargo," "in all about 60 cubic fathoms," of lath-wood. The plaintiffs shipped 83 fathoms on board the *Scandia* for Gloucester, where their agent unloaded her and set apart 60 cubic fathoms for the defendant, who declined to accept them, on the ground that he had contracted for a cargo and not for a portion of one. Kelly, C. B., and Cleasby, B., delivered judgment for the defendant; but Martin, B., was of opinion that the defendant was not more entitled to refuse the timber tendered because other timber came with it than he would have been if the cargo had consisted in part of sugar or cotton. Blackburn, J., while delivering judgment in *Ireland v. Livingstone* (d), cast some doubt on this case.

Borrowman v. Drayton (e), in 1876, was an action for not accepting, very similar to *Kreuger v. Blanck* (f). The plaintiffs contracted to sell to the defendant a cargo of from 2,500 to 3,000 barrels of petroleum. They shipped 3,000 barrels, but as this was not a full cargo, they put 300 more barrels on board, marking them so that they could be distinguished from the 3,000, and made out separate bills of lading for the two quantities. The Exchequer Court, consisting of Kelly, C. B., Cleasby and Amphlett, BB., decided that the defendant

(a) Cf. section 31 (1) of the Sale of Goods Act: "Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments."

(b) *Englehart v. Bosanquet*, not reported, but mentioned by Bramwell, L. J., in *Honck v. Muller*, 50 L. J. Q. B. 529; 7 Q. B. D. 100.

(c) *Kreuger v. Blanck*, 39 L. J. Ex. 160; L. R. 5 Ex. 179.

(d) *Ireland v. Livingstone*, 41 L. J. Q. B. 206; 5 E. & I. App. 410.

(e) *Borrowman v. Drayton*, 47 L. J. Ex. 273; 2 Ex. D. 15.

(f) *Kreuger v. Blanck*, ante.

was not bound to accept, and their judgment was affirmed in the Court of Appeal by Cockburn, C. J., James and Mellish, L.JJ., and Baggallay, J. Mellish, L. J., said, "We think that effect must be given to the term 'cargo' as distinguished from the specified quantity, as, if the parties had intended otherwise, it would have been enough to specify the quantity without introducing the term 'cargo' at all" (a).

The following are instances where goods were delivered mixed with goods of a different description not included in the contract. *Levy v. Green* (b), in 1857, was a case where the defendant gave an order for crockery of certain descriptions to the plaintiff's traveller, which the plaintiff packed in a crate larger than was necessary, and he then filled it up with crockery not ordered, apparently on sale or return. The defendant refused to accept any of the articles. Lord Campbell, C. J., and Wightman, J., were of opinion that the defendant would be put to trouble, risk, and expense beyond what by the contract he was to incur, and was therefore not bound to accept. Coleridge and Erle, JJ., were of the opposite opinion, Coleridge, J., being of opinion that where goods came mixed they could not be rejected if they were distinguishable. But neither of these Judges appears to have refuted Lord Campbell's view, which was subsequently held by the Exchequer Chamber (c) to be the correct one.

It will be noticed that, while in *Levy v. Green* the decision that the buyer was not bound to accept was rested on the ground that he would be put to trouble, risk, and expense beyond what by the contract he was to incur, section 30, sub-section (3) of the Sale of Goods Act gives the buyer an absolute right to reject, irrespective of whether he could or could not, without trouble, separate the goods.

An instance of a case in which (as under section 30,

(a) See also *Cuthbert v. Cumming*, in 1855, 24 L. J. Ex. 198; 24 L. J. Ex. 310; 10 Ex. 809; 11 Ex. 405.

(b) *Levy v. Green*, 28 L. J. Q. B. 319; 1 E. & E. 969.

(c) See also *Nicholson v. Bradford Union*, 35 L. J. Q. B. 176; L. R. 1 Q. B. 620; 7 B. & S. 747; and *Rylands v. Kreitman*, 19 C. B. N. S. 351.

sub-section (4) of the Sale of Goods Act) the buyer may be bound by special agreement to accept less than the amount of the goods specified in the contract will be found in *Graham v. Jackson* (a), in 1811, and in *McLay v. Perry* (b), in 1881.

As to Time.

In mercantile contracts, stipulations as to time (except as regards time of payment (c)) are usually of the essence of the contract.

Thus in *Reuter v. Sala* (d), in 1879, the contract was to deliver 25 tons of pepper of October ^{and}_{or} November shipment, name of vessel and full particulars to be declared to buyer within 60 days of the bill of lading. Only 20 tons were declared within the 60 days, but subsequently 5 more tons were declared. In holding that the buyer was not bound to accept, Cotton, L. J., said: "It was argued that the rules of "Courts of Equity are to be regarded in all Courts, and that "equity enforced all contracts though the time fixed therein "for completion had passed. This was in the case of contracts, "such as purchases and sales of land, where, unless a contrary "intention could be collected from the contract, the Court "presumed that time was not an essential condition. To apply "this to mercantile contracts would be dangerous and un- "reasonable. We must therefore hold that the time within "which the pepper was to be declared was an essential con- "dition of the contract."

In *Alweyn v. Prior* (e), at Nisi Prius in 1826, the contract was for the sale of "all the Gallipoli oil on board "the *Thomas* . . . on arrival in Great Britain: to be "delivered with all convenient speed, but not to exceed the "30th day of June next, &c." The vessel did not arrive till the 4th of July. The oil was tendered, but the buyer

(a) *Graham v. Jackson*, 14 East, 498.

(b) *McLay v. Perry*, 44 L. T. N. S. 152.

(c) See Sale of Goods Act, section 10 (1).

(d) *Reuter v. Sala*, 48 L. J. C. P. 492; 4 C. P. D. 239.

(e) *Alweyn v. Prior*, Ry. & M. 406.

refused to accept it; and Abbott, C. J., held that he was justified.

In *Busk v. Spence* (a), at Nisi Prius in 1815, the contract for the sale of flax stated that "the flax shall be despatched "from St. Petersburg not later than the 31st July . . . "and as soon as he (the seller) knows the name of the vessel "in which the flax will be shipped, he is to mention it to "the buyer." The flax was brought from St. Petersburg in lighters and put on board before the end of July, but the ship did not sail until the 4th of September. The seller received the advice on the 12th of September in London, but did not communicate it to the defendant at Hull until the 20th. The defendant declined to accept the flax. Gibbs, C. J., was of opinion that the flax had been despatched in due time, but that the stipulation as to mentioning the name was a condition precedent, and that it had not been complied with (b).

In *Barber v. Taylor* (c), in 1839, the contract was for 150 bales of cotton, payment being provided for in these terms: "Upon . . . forwarding a bill of lading, I will accept your "draft at sixty days' sight after the receipt of the bill of "lading." The cotton was put on board the *Romulus*, and the bill of lading was sent by the same ship, which arrived on the 21st of April. On the 24th the plaintiff told the defendant that Messrs. Wilson had the bill of lading in their possession, and would not give it up unless the defendant got a banker's guarantee of his acceptance, or paid cash, or pledged the cotton with a broker to secure payment. The defendant declined these terms, and on the 25th he offered to accept the draft if the bill of lading were handed to him. It was not handed to him, and he declared the contract was at an end. On the 3rd of May the plaintiff tendered the bill of lading with the draft, but the defendant refused to receive it or to accept the draft, on the ground that it had not been

(a) *Busk v. Spence*, 4 Camp. 329.

(b) See *Graves v. Legg*, post, p. 247, 26 L. J. Ex. 316; 9 Ex. 709; 2 H. & N. 210; and *Reuter v. Sala*, ante, pp. 241 and 244, 48 L. J. C. P. 492; 4 C. P. D. 239.

(c) *Barber v. Taylor*, 5 M. & W. 527.

tendered within a reasonable time after delivery. Parke, B., pointed out that it might be material to the buyer to have it delivered as soon as possible after its arrival, so that he might go into the market and sell, and the Court held that he was not obliged to receive it after the delay (a).

In *Startup v. Macdonald* (b), in 1843, the contract was to sell and deliver 10 tons of oil "within the last 14 days of "March"; the plaintiff tendered it at half-past eight on the evening of the last day of March. It was found that the tender had been made in time to give the defendant full opportunity to weigh, examine, and receive the oil, but the defendant, who was present, declined to receive it on the ground that the tender was made at an unreasonable time, and it was held by Rolfe, Gurney, Alderson, and Parke, BB., and Williams and Patteson, JJ., that the tender had been made in time, Lord Denman, C. J., dissenting. All the authorities were considered in this case, Parke, B., in his judgment (c) saying, "Where a thing is to be done *anywhere*, "a tender a convenient time before midnight is sufficient; "where the thing is to be done at a *particular place*, and "where the law implies a duty on the party to whom the "thing is to be done to attend, that attendance is to be by "daylight, and a convenient time before sunset" (d).

In *Duncan v. Topham* (e), in 1849, the defendant had on the 19th of February offered to take certain linseed cakes if put on board "directly." The plaintiff accepted the offer on the 22nd, saying he would ship them "to-morrow," and shipped them on the 26th. The defendant declined to accept. The plaintiff, in his declaration, set out the contract wrongly, but Cresswell, J., intimated that if he had stated it correctly the verdict would have been against him (f).

(a) Parol evidence may be given to show what is a reasonable time: *Ellis v. Thompson*, in 1838, 3 M. & W. 445; and see Sale of Goods Act, s. 29 (c).

(b) *Startup v. Macdonald*, 12 L. J. Ex. 477; 6 M. & G. 593.

(c) 12 L. J. Ex. 483; 6 M. & G. 625.

(d) See Sale of Goods Act, section 29 (4).

(e) *Duncan v. Topham*, 18 L. J. C. P. 310; 8 C. B. 225.

(f) For the meaning of the words "immediately" and "forthwith," see *Toms v. Wilson*, in 1862, 32 L. J. Q. B. 382; 4 B. & S. 442; and *Roberts v. Brett*, in 1865, 34 L. J. C. P. 337; 11 H. L. R. 337.

In *Spartali v. Benecke* (a), in 1850, the contract was for goats' wool, "to be paid for by cash in one month." Two days after the contract, when the defendants demanded the wool, the plaintiffs refused to deliver it unless paid for. The defendants declined to pay then, and refused to take the wool after the expiration of a month. The Court was of opinion that the buyers were entitled to call for the delivery of the goods at any reasonable time within the month, without tendering the price.

In *Staunton v. Wood* (b), in 1851, the contract was to deliver cable bars forthwith, payment in cash in fourteen days from the date of the contract. The Court was of opinion that the contract was to deliver within the fourteen days, and that delivery was a condition precedent to the right to sue.

And a contract to supply goods "as soon as possible" means no more than within a reasonable time, regard being had to the seller's facilities and extent of business, and to the contracts he already had in hand (c).

Graves v. Legg (d), in 1854, was an action for not accepting 300 bales of wool which were to be shipped from Odessa, and the names of the vessels to be declared as soon as the wools were shipped. The defendant pleaded that the names had not been declared, and it was held on demurrer that this was a condition precedent which had not been performed. This case was again heard (e) in 1856, when it was proved that both the plaintiff and the defendant employed the same brokers, and that the plaintiff had given notice to the brokers as soon as the wool was shipped, but that the brokers had not given notice to the defendants until some time afterwards. The Court held that the notice, which was admitted to have

(a) *Spartali v. Benecke*, 9 L. J. C. P. 293; 10 C. B. 212.

(b) *Staunton v. Wood*, 16 Q. B. 638; 15 Jur. 1123.

(c) *Per* Cresswell, J., in *Attwood v. Emery*, in 1856, 26 L. J. C. P. 73; 1 C. B. N. S. 115. See also *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670.

(d) *Graves v. Legg*, 23 L. J. Ex. 228; 9 Ex. 709. The two reports differ as to who delivered judgment.

(e) *Graves v. Legg*, 11 Ex. 642.

been given according to custom, was sufficient. This judgment was affirmed in the Exchequer Chamber (a).

In *Coddington v. Paleologo* (b), in 1867, the plaintiffs contracted to sell to the defendants 900 pieces of cloth, "delivering on April 17; complete 8 May." They delivered no goods on the 17th, and the next day the defendants wrote saying they rescinded the contract. The plaintiffs declined to allow it to be rescinded, and tendered the whole of the 900 pieces before the 8th of May. The Court was equally divided, Kelly, C. B., and Pigott, B., holding that the seller was not bound to deliver any portion of the goods on the 17th; Martin and Bramwell, BB., holding that he was bound.

Alexander v. Vanderzee (c), in 1872, was another action for not accepting a large quantity of Danubian maize which the plaintiff had contracted to sell to the defendant "for shipment in June ^{and}_{or} July." Two cargoes were tendered, for which the bills of lading were dated respectively the 4th and 6th of June. It appeared that the loading of the two cargoes began one on the 12th and the other on the 16th of May, and were completed on the 4th and 6th of June, more than half of each cargo having been put on board in May. The jury found that these were June shipments. Martin, B., Blackburn, Mellor, and Lush, JJ., thought that the question whether or not they were June shipments had been properly left to the jury, and that the defendant was not justified in rejecting the maize. Kelly, C. B., doubted whether it was for the jury to say what was meant by June shipments.

In the case of *Brandt v. Lawrence* (d), in 1876, the plaintiff had entered into two distinct and separate contracts in January, by each of which he contracted to sell to the defendant 4,500 qrs. of oats, 10 per cent. more or less, "shipment by steamer "or steamers" during a time agreed upon. The plaintiff shipped 5,650 qrs. on board the *Winstead*, and tendered them

(a) *Graves v. Legg*, 26 L. J. Ex. 316; 2 H. & N. 210.

(b) *Coddington v. Paleologo*, 36 L. J. Ex. 73; L. R. 2 Ex. 193.

(c) *Alexander v. Vanderzee*, L. R. 7 C. P. 530. See also *Ashforth v. Redford*, L. R. 9 C. P. 20.

(d) *Brandt v. Lawrence*, 46 L. J. Q. B. 237; 1 Q. B. D. 344.

to the defendant, as to 4,511 in fulfilment of the first contract and as to 1,139 in part fulfilment of the second, and the defendant refused to accept them on the ground that the shipment had not been made within the time agreed upon. Subsequently the plaintiff shipped the remaining quantity of oats on board the *Oxford*. These also the defendant declined to accept on the same grounds. The jury found that the shipment by the *Winstead* had been made in time, but that by the *Oxford* was too late. Lord Coleridge, C. J., held that the defendant was bound to accept the whole of the oats by the *Winstead*. A new trial was refused by Blackburn and Quain, JJ., and they were affirmed by Mellish, James, and Baggallay, L. JJ. Mellish, L. J., in the course of the argument, said: "I think the legal inference is, that it "was intended that the shipment should be made in different "parcels, and that the purchaser was bound to accept them "as they came if they were in time, he was not entitled to "wait in order to see whether the whole was in time." This case was referred to by Thesiger, L. J., in his judgment in *Reuter v. Sala* (a), where he said, speaking of the refusal to take all the oats on the *Winstead*, "At the time of this "refusal the sellers were acting in strict accordance with "their contract, and there was nothing to indicate that "the contract would not be performed by them in its "entirety."

In the case of *Bowes v. Shand* (b), in the House of Lords in 1877, the appellant, the buyer, in March had agreed to purchase rice from Shand by a contract in the following terms:—"To be shipped at Madras or Coast . . . during "the months of March ^{and}_{or} April, 1874, about 300 tons, per "*Rajah of Cochin*." There was also a further contract for 300 tons dated the 24th of March in the same words. The 600 tons filled 8,200 bags, and bills of lading were signed for them as follows: for 1,780 bags, bill signed 23rd February; for 1,780 bags, bill signed 24th February; for 3,500 bags,

(a) *Reuter v. Sala*, 48 L. J. C. P. 497; 4 C. P. D. 245.

(b) *Bowes v. Shand*, 45 L. J. Q. B. 507; 1 Q. B. D. 470; 46 L. J. Q. B. 201; 2 Q. B. D. 112; 46 L. J. Q. B. 561; 2 App. Ca. 455.

bill signed 28th February; and for the remaining 1,080 bags, bill signed 3rd March. But of these 1,080 bags it turned out that all but 50 were put on board on the 28th of February, and those 50 on the 3rd of March. The defendants declined to accept any of the rice, on the ground that it was not shipped during the months of March ^{ard}_{or} April, and the House of Lords held that they were entitled to do so. On the motion to enter judgment for the defendants, Blackburn, J., said that if the loading of all four parcels had commenced in February, and been completed and bills of lading signed in March, the case would have been identical with *Alexander v. Vanderzee* (a), and then it would have been a question for the jury whether this was a shipment in March ^{and}_{or} April, but that it was unnecessary to decide that in this case, because the three earlier parcels were, in every sense of the word, completely shipped in February, and it was unnecessary to consider whether the last shipment was according to contract, for the defendants, who bargained to have 600 tons shipped in March, were not bound to accept 4 tons shipped in March, and 596 shipped in February. This judgment was reversed in the Court of Appeal (b), but restored in the House of Lords (c).

In *Ashmore v. Cox* (d), in 1898, the defendants sold to the plaintiffs, by an agreement in writing, 250 bales of Manilla hemp, for shipment from a port or ports in the Philippine Islands by sailer or sailers between May 1st and July 31st, 1898. The agreement provided that if the goods did not arrive, from loss of vessel or other unavoidable cause, the contract was to be void. The Spanish-American War prevented the defendants from shipping hemp by sailer between the specified dates, but in September they shipped hemp by steamer, and on October 27th declared it against the contract. The defendants stated

(a) *Alexander v. Vanderzee*, 7 C. P. 530; *ante*, p. 248.

(b) 46 L. J. Q. B. 201; 2 Q. B. D. 112.

(c) 46 L. J. Q. B. 561; 2 App. Ca. 455.

(d) *Ashmore v. Cox*, 68 L. J. Q. B. 72; [1899] 1 Q. B. 436.

that it was the only declaration they were in a position to make, but the plaintiffs refused to accept the declaration. The Court held that the stipulation as to shipment by sailer or sailers between the specified dates was a condition precedent, and that the declaration was bad. On the other hand, in *Kidston v. Monceau Iron Works Co. (a)*, in 1902, where the defendants agreed to deliver to the plaintiffs 1,000 tons of iron on terms "Delivered . . . cost and freight "Japan direct port, specification to be given in the beginning " of May. Time of shipping May and June from Antwerp," it was held that the stipulation providing for the specification to be given "in the beginning of May" was not a condition precedent.

The word "month" means a lunar month in legal matters, but in commercial matters it always means a calendar month, unless the context shows differently (b). In Acts of Parliament it means a calendar month, unless words are added showing a lunar month to be meant (c). Accordingly section 10 (2) of the Sale of Goods Act provides that in a contract of sale "month" means *prima facie* calendar month. Where the contract is for the sale of goods to be paid for in two months, the time must be calculated exclusively of the day on which the contract was made, so that the buyer may have two entire calendar months in which to make payment (d).

As to Arrival and Delivery.

Unless there are express terms to the contrary, if the goods perish without any fault on the part of the seller, he is relieved from his obligation to deliver (e), and the buyer's

(a) *Kidston v. Monceau Iron Works Co.*, 7 Com. Cas. 82.

(b) *Per Pollock, C. B.*, in *Hart v. Middleton*, in 1845, 2 Car. & Kir. 10.

(c) 13 & 14 Vict. c. 21, s. 4.

(d) *Webb v. Fairman* (1838), 3 M. & W. 473.

(e) For the law on this subject, see Pollock's Principles of Contract—Impossible Agreements: and *Paradine v. Jane*, Aleyn. 26; *Taylor v. Caldwell*, 32 L. J. Q. B. 164; 3 B. & S. 826; *Appleby v. Myers*, 36 L. J. C. P. 331; L. R. 1 C. P. 615; 2 C. P. 651; *Bailey v. De Crespigny*, 38 L. J. Q. B. 98; L. R. 4 Q. B. 180; *Anglo-Egyptian Navigation Co. v. Rennie*, 44 L. J. C. P. 130; L. R. 10 C. P. 271; *Howell v. Coupland*, 43 L. J. Q. B. 201; 46 L. J. Q. B.

obligation still remains binding on him to pay for the goods if the property in them had passed to him at the time when they were destroyed.

This subject is dealt with in sections 6 and 7 of the Sale of Goods Act, which provide:—

“6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

“7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.”

The latter section must be read in conjunction with section 20:—

“20. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

“Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.”

In the following cases the question was whether the arrival of the goods was a condition precedent.

In *Boyd v. Siffkin* (a), at Nisi Prius in 1809, the sold note was in the following terms:—“Sold for Mr. H. Siffkin to Mr. Boyd, about 32 tons more or less of Riga Rhine hemp, on arrival per *Fanny and Almira*.” The vessel arrived with

147; L. R. 9 Q. B. 462; 1 Q. B. D. 258; *Hills v. Sughrue*, 15 M. & W. 253; *Robinson v. Davison*, 40 L. J. Ex. 172; L. R. 6 Ex. 269; *Jackson v. Union Marine Insurance Co.*, 42 L. J. C. P. 284; 44 L. J. C. P. 27; L. R. 8 C. P. 572; *Nickoll v. Ashton*, 69 L. J. Q. B. 640; [1900] 2 Q. B. 298; 70 L. J. K. B. 600; [1901] 2 K. B. 126; and the Coronation Cases: *Krell v. Henry*, [1903] 2 K. B. 740; *Blakeley v. Muller* and *Hobson v. Pattenden* (1903), 88 L. T. 90; *Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K. B. 756; *Chandler v. Webster*, [1904] 1 K. B. 493.

(a) *Boyd v. Siffkin*, 2 Camp. 326.

no hemp on board. The buyer brought this action for not delivering. Lord Ellenborough was of opinion that the words "bought" and "sold" in the notes meant contracted to buy and sell on arrival of the hemp, not of the ship, and nonsuited the plaintiff.

In *Idle v. Thornton* (a), at Nisi Prius in 1812, the contract was for 200 casks of tallow "on arrival:" "if it should not arrive on or before the 31st of December next, the bargain to be void." The vessel, with the tallow on board, was wrecked off Montrose in November; the greater part of the tallow was saved, and might have been forwarded to London by the 31st of December, but the defendants sold it at Leith. Lord Ellenborough held that the contract was conditional on the arrival of the tallow in London in the ordinary course of trade, and nonsuited the plaintiffs, the buyers.

In *Alexander v. Gardner* (b), in 1835, the contract was to pay for butter by a bill at two months after the butter was landed. The Court held that this term was introduced to fix a date for payment, and not to make the landing a condition precedent.

In *Lovatt v. Hamilton* (c), in 1839, the seller was sued for damages for not delivering 43 tons of oil. The contract was for "50 tons of palm oil, to arrive per *Mansfield*. In case of non-arrival, or the vessel's not having so much in after delivery of former contracts, this contract to be void." Part of the *Mansfield's* cargo was transhipped to the *Watt*, and when the *Mansfield* arrived, and delivery on former contracts had been made, there were only 7 tons left for the plaintiff. The Court held that the arrival of the oil in the *Mansfield* was a condition precedent, and that the plaintiffs were not entitled to the oil transhipped on to the *Watt*. And further, that the contract was entire, and the plaintiffs were not entitled to the 7 tons which did arrive by the *Mansfield*.

(a) *Idle v. Thornton*, 3 Camp. 274.

(b) *Alexander v. Gardner*, 1 Bing. N. C. 677.

(c) *Lovatt v. Hamilton*, 5 M. & W. 639.

Johnson v. Macdonald (a), in 1842, was an action against the seller for not delivering soda according to the following contract:—"100 tons of nitrate of soda, at 18s. per cwt., to "arrive ex *Daniel Grant*, to be taken from the quay." The *Daniel Grant* arrived without any soda on board. The plaintiffs contended that there was a warranty that the goods should arrive, "but," said Parke, B., "the words 'to arrive' "and 'on arrival' meant the same thing, and the word 'to' "was not the same as 'shall,'" and he held that the performance of the contract was conditional on a double event—the arrival of the vessel, with the cargo on board (b).

In *Gorriessen v. Perrin* (c), in 1857, the action was for not delivering 1,170 bales of gambier stated in the contract to be "now on passage from Singapore, and expected to arrive at "London, viz., per *Ravensraig* 805 bales, per *Lady Agnes Duff* 365 bales." Both ships arrived with the specified number of packages on board consigned to the defendants, but these packages were only one-third of the weight of packages of gambier known in the trade as bales. There were also on board a number of bales sufficient to satisfy the contract and of full weight, but not consigned to the defendants. The plaintiffs at first declined to accept the light bales, but subsequently did accept them, and brought this action against the sellers on two counts, first for breach of the warranty that bales of the description known in the market as bales were on their passage from Singapore, and second for breach of contract to deliver bales of the description commonly known in the market as bales. The defence was that the duty to deliver depended on a double contingency, viz., that the stipulated number of bales should arrive and should come consigned to the defendants. The case was decided on the first count and in favour of the plaintiff, the Court being of opinion that the statement that the goods were

(a) *Johnson v. Macdonald*, 12 L. J. Ex. 99; 9 M. & W. 601.

(b) For meaning of "now on passage, expected to arrive," see *Gorriessen v. Perrin*, in 1857, 27 L. J. C. P. 29; 2 C. B. N. S. 681; and *Fischel v. Scott*, in 1854, 15 C. B. 69.

(c) *Gorriessen v. Perrin*, 27 L. J. C. P. 29; 2 C. B. N. S. 681; *supra*, p. 236.

"now on passage from Singapore" amounted to a positive assurance that the goods were then on their passage; although, if circumstances had subsequently occurred whereby the arrival of the goods had been prevented, the defendants might have been protected by the words "expected to arrive." The second count thus became immaterial, but Cockburn, C. J., delivering the judgment of the Court, said: "It may well be, that if a man takes upon himself to dispose of goods expected to arrive by a certain ship, as goods over which he has a power of disposal, and the goods afterwards arrive not consigned to him, he shall be precluded from saying, that, in addition to the contingency of their arrival, there was implied the further contingency of their coming consigned to him. He has dealt with them as his own, and cannot be allowed to import into the contract a new condition, viz., that the goods on their arrival shall prove to be his."

Tregelles v. Sewell (a), in 1862, was an action by the buyer against the seller for not delivering a balance of 20 tons. The contract was for the sale of "300 tons Old Bridge Rails, at 5*l.* 14*s.* 6*d.* per ton, delivered at Harburgh, cost, freight, and insurance; payment by net cash in London, less freight, upon handing bill of lading and policy of insurance." The defendant shipped the 20 tons which remained to be delivered on board a vessel bound for Harburgh, and, having insured the iron, handed the bill of lading indorsed in blank together with the policy to the plaintiffs, and received payment less freight. On the voyage the vessel met with a storm and put into a port for repairs, where the iron was seized under an execution on a bottomry bond. It was contended for the plaintiffs that this was a contract to deliver the iron at Harburgh, but the Court held, and the judgment was affirmed on appeal, that the contract was not to deliver at Harburgh, but that the iron was to be shipped for Harburgh and insured, and to be paid for at the rate of 5*l.* 14*s.* 6*d.* per ton, which was to include cost, insurance, and freight to Harburgh.

(a) *Tregelles v. Sewell*, 7 H. & N. 574.

In the case of *The Calcutta and Burmah Steam Navigation Co. v. De Mattos* (a), in 1863, there were cross-actions, in one of which the company sought to recover damages from De Mattos for not delivering coal, and to recover half the price paid in advance for the coal which he had not delivered in consequence of loss at sea, and in the other De Mattos sued for the unpaid balance. The company, wishing to have coal supplied to them at Rangoon, entered by letters into a contract with De Mattos, of London, to supply them with 1,000 tons of coal, at 2*l.* 5*s.* a ton, delivered over the ship's side at Rangoon; payment to be made in cash, one half on handing over the bill of lading and policy of insurance to cover the amount, the other half on delivery at Rangoon. De Mattos chartered the *Waban* and put on board 1,166 tons, on which he effected an insurance for 1,400*l.*, and handed the policy and bills of lading to the company. The bill of lading made the coal to be deliverable to company or assigns. The invoice value of the coal was 2,623*l.* 10*s.*, and the company paid De Mattos one half of this sum, viz., 1,311*l.* 15*s.* less discount. The *Waban* sailed, and, owing to bad weather, a portion of the coal had to be thrown overboard, and on putting into the Mauritius she was deemed unseaworthy, and her cargo was discharged, and 860 tons of the coal were reshipped on board the *Alfred Lamont*. When the *Alfred Lamont* arrived at Rangoon her captain claimed 45*s.* a ton freight, and on the company's agent refusing to pay it, the coal was sold by auction.

The chief questions were whether the company were entitled to recover back the sum paid by them to De Mattos, and whether De Mattos could recover from the company the balance, viz., 1,311*l.* 15*s.*, of the invoice value of the coal.

Blackburn, J., in delivering (b) his judgment, in which Mellor, J., concurred, said "the case depended on what was "the effect of the contract as regards the property in the "goods and the right to the price, from the time of the

(a) *Calcutta and Burmah Steam Navigation Co. v. De Mattos*, 32 L. J. Q. B. 322; 33 L. J. Q. B. 214.

(b) 32 L. J. Q. B. 328.

“handing over the shipping documents, and paying half of the
“invoice value. There is no rule of law to prevent the
“parties in cases like the present from making whatever
“bargain they please. If they use words in the contract
“showing that they intend that the goods shall be shipped
“by the person who is to supply them on the terms that
“when shipped they shall be the consignee’s property and at
“his risk, so that the vendor shall be paid for them whether
“delivered at the port of destination or not, this intention is
“effectual. Such is the common case where goods are
“ordered to be sent by a carrier to a port of destination.
“The vendor’s duty is in such cases at an end when he has
“delivered the goods to the carrier, and if the goods perish
“in the carrier’s hands, the vendor is discharged, and the
“purchaser is bound to pay him the price. See *Dunlop v.*
“*Lambert* (a). If the parties intend that the vendor shall
“not merely deliver the goods but also undertake that they
“shall actually be delivered at their destination, and express
“such intention, this also is effectual. In such a case, if the
“goods perish in the hands of the carrier, the vendor is not
“only not entitled to the price, but he is liable for whatever
“damage may have been sustained by the purchaser in con-
“sequence of the breach of the vendor’s contract to deliver
“at the place of destination. See *Dunlop v. Lambert* (a).
“But the parties may intend an intermediate state of things;
“they may intend that the vendor shall deliver the goods to
“the carrier, and that when he has done so he shall have
“fulfilled his undertaking, so that he shall not be liable in
“damages for a breach of contract, if the goods do not reach
“their destination, and yet they may intend that the whole
“or part of the price shall not be payable unless the goods
“do arrive. They may bargain that the property shall vest
“in the purchaser as owner as soon as the goods are shipped,
“that then they shall be both sold and delivered, and yet
“that the price (in whole or in part) shall be payable only
“on the contingency of the goods arriving, just as they

(a) *Dunlop v. Lambert*, 6 Cl. & Fin. 600.

“might, if they pleased, contract that the price should not
“be payable unless a particular tree fall, but without any
“contract on the vendor’s part in the one case to procure the
“goods to arrive, or in the other to cause the tree to fall . . .
“The parties in the present case have not, in express terms,
“declared their intention as to the time when the property
“in the coals was to be transferred from De Mattos, who was
“to supply the coals, to the company; and we are left to collect
“the intention from the various stipulations in the contract.
“It is clear that the coals are to be shipped in this country,
“on board a vessel to be engaged by De Mattos, to be
“insured, and the policy of insurance and the bill of lading
“and invoice to be handed over to the company. As soon
“as De Mattos, in pursuance of these stipulations, gave the
“company the policy and bill of lading, he irrevocably
“appropriated to this contract the goods which were thus
“shipped, insured, and put under the control of the company.
“After this he could never have been required, nor would he
“have had the right to ship another cargo for the company,
“so that from that time, that which had originally been an
“agreement to supply any coals answering the description
“became an agreement relating to those coals only just as
“much as if the coals had been specified from the first.” . . .
“As to one-half of the price, the balance, as it is called in
“the letters forming the contract, the intention that it should
“only be paid ‘on completion of delivery at Rangoon,’ seems
“to me as clearly declared as words could possibly declare
“it; and consequently, I think, as to that half of the price
“no right vested in De Mattos, unless and until there is a
“complete delivery at Rangoon. But, consistently with this,
“there might be an intention that there should be a complete
“vesting of the property in the goods in the company, and a
“complete vesting of the right to the half of the price in De
“Mattos; so as in effect to make the goods be at the risk of
“the company, though half the price was at the risk of De
“Mattos: so that the goods were sold and delivered, though
“the payment of half the price was contingent on the
“delivery. And this, I think, is the true legal construction

“of the contract.” Blackburn and Mellor, JJ., were of opinion that the company were not entitled to recover back any money, and that De Mattos was not entitled to the balance of the price; Cockburn, C. J., and Wightman, J., being of the opposite opinion. On appeal to the Exchequer Chamber, Erle, C. J., Martin, B., Willes, J., Channell and Pigott, BB., came to the same conclusions as Blackburn and Mellor, JJ. And Williams, J., concurred in the views of Cockburn, C. J., and Wightman, J. On the question whether De Mattos had contracted to deliver at all events at Rangoon, Blackburn, J., considered the case identical with that of *Tregelles v. Sewell* (a).

In *Paynter v. James* (b), in 1867, the agreement was that two-thirds of the freight should be paid “on right delivery of the cargo.” Held, that the payment of the freight and the delivery of the cargo were intended to be concurrent acts.

Smith v. Myers (c), in 1870, was an action for damages for not delivering 600 tons of nitrate of soda under very unusual circumstances. The defendants were merchants at Liverpool, and were in partnership with a house at Valparaiso. On the 15th of July the Valparaiso house, in obedience to the defendants’ instructions, purchased 600 tons of nitrate of soda, and on the following day chartered a ship named the *Precursor* to take it to England. They advised the defendants of the purchase. On the 13th of August an earthquake destroyed the greater portion of the soda, and some time afterwards the Valparaiso house cancelled the charter of the *Precursor*. The defendants, on the receipt of the advice of the purchase of the soda by the Valparaiso house, and being ignorant of its loss, through their brokers, sold the soda to the plaintiffs. The material parts of the sold note were, “Liverpool, Sept. 8, 1868. Messrs. William “Smith and Co. We have this day sold to you on account

(a) *Tregelles v. Sewell*, 7 H. & N. 574.

(b) *Paynter v. James*, L. R. 2 C. P. 348.

(c) *Smith v. Myers*, 39 L. J. Q. B. 210; 41 L. J. Q. B. 91; L. R. 5 Q. B. 429; L. R. 7 Q. B. 139.

“of Messrs. Myers, Son and Co. about 600 tons, more or less, being the entire parcel of nitrate of soda expected to arrive at port of call, per *Precursor*, at 12s. 9d. per cwt. . . . Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void.” The defendants informed the Valparaiso house of the sale, and the Valparaiso house, being in doubt whether the defendants might not still be liable to the plaintiffs, purchased another 600 tons of nitrate of soda; and again chartered the *Precursor*, shipped the soda, and consigned it to the defendants. On hearing of the loss of the 600 tons first purchased, the defendants wrote to the plaintiffs’ brokers saying the contract was void, and sold the second 600 tons to other parties. The plaintiffs demanded the second 600 tons. But it was held, both in the Queen’s Bench and on appeal by the Exchequer Chamber, that they were not so entitled, on the ground that the goods which arrived were not those which were contracted for as expected to arrive. The cargo contracted for had perished. The contract related to goods which were to arrive by a particular voyage, which voyage was never made, and it was a mere accident that goods of the same description as those contracted for should have come consigned to the defendants in the same vessel which was to have brought those goods.

In *Nickoll v. Ashton* (a), in 1900, the defendants, by a contract made in October, 1899, sold to the plaintiffs a cargo of cottonseed to be shipped per steamship *Orlando*, at certain ports in Egypt, during the month of January, 1900, and to be delivered in the United Kingdom; and the contract further provided that in case of prohibition of export, blockade, or hostilities preventing shipment, the contract or any unfulfilled part thereof should be cancelled. In the month of December, 1899, the *Orlando* stranded through perils of the seas, and was so badly damaged that it was impossible for her to arrive at the ports of loading under the contract in time to

(a) *Nickoll v. Ashton*, 69 L. J. Q. B. 640; [1900] 2 Q. B. 298; 70 L. J. K. B. 600; [1901] 2 K. B. 126.

load during January, 1900. The plaintiffs brought their action against the defendants for damages for failure to ship a cargo under the contract, but it was held by A. L. Smith, M. R., and Romer, L. J., that the action was not maintainable, as the contract must be construed as being subject to the implied condition that if at the time for performance the *Orlando* should, without default on the defendants' part, have ceased to be fit to ship the cargo, the contract should be treated as at an end. Vaughan Williams, L. J., dissented on the ground that although the *Orlando*, by perils of the seas, could not have been loaded in January, there was nothing to prevent the buyers waiving the time condition, and nothing in the facts of the case to suggest that the delay for repairs to the ship would have been so long as to put an end to the commercial speculation; and that, therefore, there was no impossibility of performance.

In many contracts the delivery of the goods is a condition precedent to the right to sue for the price; but where the buyer dispenses with the performance of the condition, or the performance becomes an impossibility, the right arises at once. Of such contracts *Cort v. Ambergate Ry. Co.* (a) and *Taylor v. Caldwell* (b), and other cases of their class, are good examples.

In *Neill v. Whitworth* (c), in 1865, the defendants, the sellers, contracted to sell to the plaintiffs "500 bales of cotton at 15½d. per lb., . . . to arrive in Liverpool per ship or ships from Calcutta. . . . The cotton to be taken from the quay, &c." The cotton was landed on the quay, and placed in a warehouse; and on a subsequent day the defendants offered to deliver the cotton from the warehouse at quay weights free of warehouse charge, or to carry it back to the quay and deliver it there, but the plaintiffs declined to accept it, on the ground that it should have been delivered at the time and place contracted for, viz., on arrival from the quay. The Court, however, held that the words

(a) *Cort v. Ambergate Ry. Co.*, 20 L. J. Q. B. 460; 17 Q. B. 127.

(b) *Taylor v. Caldwell*, 32 L. J. Q. B. 164; 3 B. & S. 826.

(c) *Neill v. Whitworth*, 34 L. J. C. P. 155; 18 C. B. N. S. 435.

"to be taken from the quay" were not a condition precedent, but were an independent stipulation introduced solely for the benefit of the sellers, to enable them to call upon the buyers to take the cotton from the quay in order to save expense (a).

The following are Examples of other Forms of Conditions Precedent.

Tamvaco v. Lucas (b), in 1861, was an action for not accepting a cargo of wheat which the plaintiffs had contracted through the defendants, who acted as brokers *del credere*, to sell to Dart, who became insolvent. The contract was for a cargo of about 2,000 qrs. of wheat at 50s. f.o.b. at Taganrog, including freight and insurance to a safe port in the United Kingdom, "payment, cash in London in exchange for shipping documents." The plaintiffs tendered a bill of lading for 1,850 $\frac{1}{10}$ qrs., a provisional invoice for the same quantity, a policy of insurance for 3,600l., and the charter-party. The defendants refused them, contending that the policy did not cover the whole of the buyer's risks, as appeared from the provisional invoice and bill of lading; in other words, that it should have covered 1,850 $\frac{1}{10}$ qrs. at 50s. = 4,626l. The freight to be paid amounted to 1,001l. 10s. The Court held that, inasmuch as freight would not have to be paid unless the cargo arrived, it was not necessary that the policy should cover the freight; and thus the sum uncovered amounted to 24l. 10s. only; and that the meaning of the contract was not that the policy was to be calculated at 50s., so as to cover the buyer's interest, but should be for such an amount as an ordinary shipper would have effected for protecting his interest in the port of dispatch. The Court refused to disturb the verdict which the plaintiff had obtained, and was affirmed in the Exchequer Chamber.

In *Sanders v. McLean* (c), in 1883, the seller brought an

(a) For rules as to place of delivery, &c., see Sale of Goods Act, s. 29.

(b) *Tamvaco v. Lucas*, 30 L. J. Q. B. 234; 1 B. & S. 185; 31 L. J. Q. B. 296; 3 B. & S. 89.

(c) *Sanders v. McLean*, 52 L. J. Q. B. 481; 11 Q. B. D. 327.

action against the buyer for refusing to accept iron for which the buyer had contracted to pay in London in cash in exchange for bills of lading and policies of insurance. The bill of lading was in three parts. The seller tendered two of them, the third being in the shipper's hands in St. Petersburg. The buyer refused to accept, and the seller, having procured the third part, tendered all three, but at this time the ship on board of which the iron was shipped was so far on her voyage to Philadelphia, the place of delivery, that she would in all probability arrive there before the bills of lading, and warehouse expenses would necessarily be incurred. The buyer again declined to accept. The Court of Appeal held that the first tender was good, and that was sufficient for the case, but Brett, M. R., was of opinion that the second tender also was good.

In *Bianchi v. Nash* (a), in 1836, the plaintiff agreed to let the defendant a musical box on condition that if it were damaged while in his possession he should have it and pay an agreed sum for it. It was damaged, and the plaintiff recovered the price in an action for goods sold and delivered.

In some cases compliance with the provisions of a statute may be a condition precedent to the right to recover the price of goods sold, but this is not the case where the object of the statute is to enforce a penalty on the seller where he enters into a contract without compliance, and not to make the contract void; as in *Smith v. Mawhood* (b), in 1845, where tobacco had been sold and the sellers had omitted to take out a licence or to paint their names on the premises pursuant to 6 Geo. 4, c. 81.

(a) *Bianchi v. Nash*, 1 M. & W. 545.

(b) *Smith v. Mawhood*, 15 L. J. 149; 14 M. & W. 452; and *Cundell v. Dawson*, in 1847, 17 L. J. C. P. 311; 4 C. B. 376. See also 38 & 39 Vict. c. 63, which enacts that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser: *Knight v. Bowers*, 14 Q. B. D. 845.

Weighing necessary to pass property where goods sold by weight. *Ross v. Hannan*, 19 S. C. R. 227, affirms the principle that where goods are sold by weight the weighing is a condition precedent to the passing of the property. The facts are not clearly stated in the report. Patterson, J., was doubtful whether, independently of the difficulty just mentioned, there had been any clear validation of the contract under the Statute of Frauds, as the property remained in the vendor's possession undelivered. There had been probably sufficient acts done to show an acceptance. The case turned partly on the obligation of the seller in possession to take care of the goods, the law of Quebec being thus stated by Taschereau, J.: "The vendor who agrees to retain possession of moveable goods till the vendee is ready to take them is a depositary, and as such is bound to apply in keeping of the thing the care of a prudent administrator."

Specific goods. Property passes although purchaser may intended to check weights or measurements. The general principle that property in specific ascertained goods ready to be delivered passes to the purchaser unless something is to be done by the seller or by the seller and buyer jointly to ascertain the price by weighing, measuring or testing, is recognized in all the well-decided Canadian cases. In *Gilmour v. Supple*, 11 Moore, P. C. 551 (1858), which went to the Privy Council, the subject of sale was a raft of logs which had been measured by an officer appointed under a Canadian Act, by whom a specification was made out, showing the contents of each log and making a total of 71,443 feet, which was regarded as important, because the specification was given to the purchaser before the contract was made, and he knew from it what quantity the seller would charge him for, although in the written memorandum of sale the quantity was merely defined as about 71,000 feet. The purchaser retained the specification and sent it over to the place where he had booms for receiving the logs. It was proved that it was usual for purchasers, sometimes before and sometimes after the logs were placed within the booms, to check over the logs received with the specifications and see that they corresponded therewith. But there was no evidence of its being usual to measure the

contents of each log. It was also proved that delivery at a boom meant delivery outside of the boom. The logs in this case were, under the contract, to be delivered at the boom, and were accordingly towed down the river by steamboat and fastened outside of the boom, of which notice was given to the purchaser's servants, who, in fact, assisted in fastening the raft to the boom, but there was conflicting evidence as to whether possession had been given up by the vendor's servants and taken by those of the purchaser. In the night a storm arose and the logs were lost. The question was who should bear the loss. Sir Creswell Creswell, speaking for the Judicial Committee, was struck by "the ingenuity with which sellers have contended that the property in goods contracted for had or had not become vested in the buyers, according as it suited their interest, and buyers or their representatives have, with equal ingenuity, endeavored to show that they had or had not acquired the property in that for which they had contracted; and judges have not unnaturally appeared anxious to find reasons for giving a judgment which seemed to them most consistent with natural justice." The law of England is then stated as in the text, that the property in specific ascertained goods immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. The determining circumstance in the present case was that there was nothing from which it could be inferred that the seller was to make any further measurement of the raft in order to ascertain the price, which could be computed from the measurement already made. "The buyer might, for his own satisfaction, as was said in *Swanwick v. Sothorn*, 9 Ad. & Ell. 895, measure it when delivered, but the seller had no such privilege or duty; . . . moreover, in this case the evidence showed that, according to the usage of trade, neither party would have measured the timber at the place of delivery so as to ascertain the amount to be paid for it. If the buyer had compared the logs delivered with the specification, still that document would have been referred to for the purpose of ascertaining the contents. There was therefore nothing more to be done by the seller on his own behalf;

“ he had ascertained the actual price of the raft by the
“ measurement previously made; nor was there anything
“ to be done by him for the buyer; the seller had, accord-
“ ing to his contract, conveyed the raft to Indian Cove, and,
“ according to the finding of the jury, had delivered it
“ there. Nor was there anything to be done in which they
“ both were to concur, as in *Simmons v. Swift*, 5 B. & C.
“ 857; the case therefore depends upon the effect of a
“ contract for the sale of certain ascertained goods, without
“ anything to limit or control its legal operation. By such
“ a contract the property was changed, and the loss must
“ fall on the buyer.”

The same question arose in *Lockhart et al. v. Pannell*, 22 U. C. C. P. 597 (1873), in which the subject of sale was a stock of goods, as shown by the stock book, and which were sold for the sum of \$7,695.24, of which the purchaser paid in cash \$2,782, taking a receipt, on which was endorsed a memorandum that the balance was to be paid in notes at three, six and nine months, and the purchaser was to go to Ingersoll, where the goods were, next morning, and take possession. On the day of the sale the purchaser got possession of the key, and on the following day took possession, and while he was engaged in packing up the goods with a view to their removal they were destroyed by fire. The case is too plain as to the point now under consideration to be questioned. Hagarty, C.J., said that, even if the goods were to be checked with the stock-book as a necessary preliminary to ascertain the amount for which the notes were to be given, and though the purchaser declined to be bound by the quantities in the stock-book, he saw no reason why the property should not have passed, if it were the intention of the parties that it should pass. In this case the learned Chief Justice quotes a dictum of Cockburn, C.J., in *Martineau v. Kitching*, L. R. 7 Q. B. 436 (1872), which is eminently reasonable, and may one day be the law, but which goes a little beyond any of the decided cases. He says: “ I agree to sell a man a specific thing, say a stack
“ of hay or a stack of corn. I agree to sell him that specific
“ thing, and he agrees to buy it; the price undoubtedly
“ remains an element of the contract; but we agree, instead
“ of fixing upon a precise sum, that the sum shall be ascer-

“tained by a subsequent measurement. What is there to prevent the parties from agreeing that the property should pass from one to the other, although the price is afterwards to be ascertained by admeasurement. I take it that is the broad substantial distinction. If, with a view to the appropriation of the thing, the measurement is to be made, as well as the price ascertained, the passing of the property being a question of intention between the parties, it did not pass because the parties did not intend it to pass.” The context shows that Cockburn, C.J., is speaking not of an express agreement, as to which there could never be any question, but of the agreement to be inferred from the fact of the goods being specific; and in that sense the cases have never gone to the full extent of his dictum, though there has been a somewhat steady development in that direction, so far as regards the necessity for weighing or measuring as a condition to the passing of the property.

Price agreed upon necessary in goods bargained and sold. This was decided in Upper Canada in 1846, in *Elwidge v. Richardson*, 3 U.C.Q.B. 149, in which it was held that the count should have been for not accepting the goods. The matter has become of comparative unimportance under the present system of pleading and with the present liberality in allowing amendments. The same remark applies to the case of *Lane v. Melville*, 3 O.S. 124, where goods were ordered to be made by plaintiff in England and on arrival here went into the hands of the plaintiff's agent, who did not tender them or leave them with the defendant, and the plaintiff sued for goods sold and delivered. It was held that the action should be for refusing to accept the goods, but it was treated as an open question whether he could not have sued for goods sold. That would, of course, depend upon whether the property had passed, which question could not arise, as the action was for goods sold and delivered and they had not been delivered.

In *Sheriff v. McCoy*, 27 U.C., Q.B. 597, to an action on the common counts for goods sold, the defendant pleaded that at the time of the sale the plaintiff agreed to accept in payment two promissory notes made by one Merrit. Defendant replied that he was induced to receive these notes by fraud,

of which he gave the particulars, being fraudulent representations respecting the notes. The facts as stated in the particulars being admitted by defendant's counsel, it was held that the plaintiff could not recover, for, there being an express contract, the defendant's fraud could not create an implied one, though it would entitle the plaintiff to recover back the goods or maintain a special action for the deceit.

In *Auger v. Thompson*, 3 O. A. R. 19, the defendant gave the note of a third party for a buggy. The note was not paid upon maturity, whereupon the plaintiff sued the defendant on the common counts for the price, alleging that he had induced him to take the note by fraudulent representations. It was held that, there being an express contract to take the note for the buggy, no agreement to pay any money could be implied by reason of the alleged fraud. The transaction was held to be one of barter, not of sale for a money price.

The case is distinguished from one where the purchaser at a money price induces the vendor to accept a worthless note as payment of that price. "In the case we are considering the defendant did not agree to purchase the buggy at a certain price and then induce the plaintiff to accept the note as payment."

The previous case of *Sheriff v. McCoy* is also treated as not being a sale, Mr. Justice Wilson being quoted to the following effect: "The plaintiff is attempting to make a contract for a sale of goods when no such sale was ever made in fact, or in law, and when the defendant never promised to pay cash. He is not without remedy, for he may sue for the fraud in an action on the case or in trover for the goods parted with."

In both these cases the note taken in payment was the note of a third person. If the note had been given by the purchaser in payment of the goods, doubtless the action for goods sold would lie after the maturity of the note and its dishonour, and the fact that the plaintiff was induced by fraud to accept the note would not prevent the plaintiff from recovering for the goods sold.

Property may vest in purchaser before completion or readiness to be delivered. Where it is expressly agreed between the parties that the property is to vest in the purchaser at any particular stage in the course of its prepara-

tion, the agreement governs, and, as stated in the text, the effect of the cases is that where the price is to be paid accordingly as the work progresses from stage to stage, the general property vests upon payment of one of the instalments.

Canadian cases have occurred of this kind, both under express agreements for the vesting of the property, and under the agreement inferred from the terms of payment. The case of the *Bank of Upper Canada v. Killaly*, 21 U. C. Q. B. 9 (1861), was of the latter class. One Pierson had agreed to build for the Grand Trunk Railway Company one hundred freight cars according to a pattern car and specifications, the company paying for each car \$825; payments to be made monthly by the company on the estimate made by a person appointed by the company on materials furnished and work done, "payments to be made to the satisfaction of the Bank of Upper Canada, who are to act as receivers." All but sixteen cars had been delivered, and these sixteen had been approved of, and were to be sent to the Suspension Bridge to wait for the springs, which the company were to furnish. The transaction between the company and the bank is not material to the present purpose. It was held that by the agreement between Pierson and the company the cars vested in the company before delivery and could not be seized under execution against Pierson. The case was held to resemble the early case of *Wood v. Bell et al.*, 5 E. & B. 772, in which a ship was to be constructed, to be paid for in instalments dependent upon the successive stages reached in the construction. McLean, J., speaks of a lien in favor of the Grand Trunk Railway Company, but Burns, J., discussed it as a question whether the property vested in the Grand Trunk Company before the final delivery, dependent upon the intention of the parties, and held that the company had a vested right of property in the cars, which they could and did transfer to the plaintiff bank.

In *Burnett et al. v. McBean*, 16 U. C. Q. B. 466 (1858), the contract was to make bricks for the plaintiffs, who were to find the wood "to burn the kilns," and did find it to the amount of several hundred pounds. They were to deduct the cost of the wood from the price they were to pay for

the bricks, which was fixed at a certain price per thousand. The trial judge left the case to the jury with a direction that if the bricks were made upon the understanding that they were to be manufactured for the plaintiffs, and were to be theirs as they were made, without any delivery being necessary, the plaintiffs should recover in an action against the defendant, who claimed them under an assignment from the manufacturer. There was proof that the manufacturer, when applied to by parties who wished to buy some of the bricks, had referred them to the plaintiffs as the owners. No very great stress is laid upon this circumstance, but it would not be absolutely safe to read the case as a decision that the mere fact of the plaintiff agreeing to find the wood and deduct the cost from the price of the bricks would be enough to warrant the trial judge in leaving it to the jury to find that the intention was to pass the property in the bricks as manufactured. Probably, however, that was the view held by the court.

In *Kelsey v. Rogers et al.*, 32 U. C. C. P. 624 (1882), the plaintiff entered into an agreement with one McDonald, by which the latter agreed "to furnish to the joint account" 12,000 to 15,000 staves of different kinds at stipulated prices, "at which prices the parties agree to make it a joint account transaction, share and share alike in gain or loss," Kelsey to furnish some competent man to cull and mark the staves and to make reasonable advances from time to time, as the progress of the work shall warrant, the expenses of such culler, as also interest on the money advanced, to be charged to the joint account, "said staves to be considered at all times, whether marked or not, the property of said Kelsey as security for advances." McDonald proceeded to purchase timber to make the staves, and got timber from three persons therefor with the money supplied by Kelsey. It was held that the staves became the property of the plaintiff as soon as made, and never were the property of McDonald. The written contract between the parties also provided that the staves should be considered at all times, whether marked or not, the property of said Kelsey, as security for advances. "On this I consider and hold that as each stave was made and became a stave, it also became and was Kelsey's property, and

“ that as McDonald never was its owner, the bills of sale “ have nothing to do with it.” This decision of Hagarty, C.J., was sustained on appeal by the Common Pleas Division.

To be returned or paid for. Action for goods sold. Where the defendant signed a memorandum that the goods were to be returned, or paid for, an action for goods sold and delivered was sustained. “ The goods having been before “ in the possession of Clarkson, the defendant, whether on “ commission or otherwise, can make no difference; for all “ that appears they were in his possession when he gave this “ memorandum, which fairly imports that he was to hold “ them as a purchaser and pay for them like any other “ purchaser unless he should return them in a reasonable “ time, or at least, upon request.” The goods had been demanded and it was held that not having been returned they could be sued for as goods sold and delivered. *Harvey v. Clarkson*, 6 U. C. Q. B. 27.

Duty of a vendor to deliver and agreement to insure do not prevent passing of property meantime. In *Bank of Montreal v. McWhirter*, 17 U. C. C. P. 506 (1867), the sale was of a specific lot of cheese, being all the cheese in the vendor's curing house, to which, however, he was to add twenty-four cheeses, to be made, to bring the number up to six hundred. The cheese was sold at so much per pound, and had not been weighed at the time the bargain was made on 13th September. By a memorandum of that date, the vendor agreed to keep the cheese insured until wanted. Subsequently two warehouse receipts were given to the purchaser, specifying the weight of the cheese. It was held that even if the property did not pass by the contract, because of the weight not being ascertained, that objection was removed when the warehouse receipt was given, which specified the weight. As to the delivery of the cheese and the stipulation respecting insurance, A. Wilson, J., said: “ No doubt the general construction of such transactions “ as the present one is that a sale has been made, and that “ the property has passed, although the possession is to “ remain for a time with the vendor, and there is no insuperable rule of law which prevents such an operation, if “ such were the intention of the parties, although the seller

“ had still something to do upon or in respect of the
“ property. The obligation or duty upon the vendor, to
“ deliver the cheese at the railway station several miles
“ off, did not necessarily prevent a transfer of the property
“ from taking place by the effect of the bargain, more than
“ the engagement by the vendor that he would keep the
“ cheese insured until Kains wanted it, would prevent its
“ passing.”

Property reserved in vendor by express agreement. A number of cases occur in the Canadian reports, in which it was specially agreed between the parties that the property should remain in the vendor until the performance of certain conditions. The rules for determining whether the property passes or not are merely rules for discovering the intention of the parties, and where this is expressed nothing further is required. It only remains to interpret the agreement correctly. The questions that arise upon such agreements relate mainly to the operation of the statutes for the protection of persons dealing with the property as if the goods were those of the persons in possession. It does not seem profitable to give the details of the various cases in which agreements of this nature have been interpreted. They establish no general principles, and the decision in every case turns upon the wording of the several agreements.

A condition suspending the passing of property till price paid is valid. It would hardly have been supposed that authority was necessary to establish this proposition, but the point was actually raised in *La Banque d' Hochelaga v. The Waterous Engine Works Co.*, 27 S.C.R., 406, and the Chief Justice, Sir Henry Strong, devotes a page of the reports to a presentation of the authorities, citing a judgment of Sir Alexander Lacoste, and a case decided by the Court of Appeal at Lyons, where it was expressly decided that “ a sale under conditions suspensive . . . whereby
“ the property is reserved to the seller until the whole of the
“ price is paid is valid.”

Property not to pass till paid for. Effect of agreement. In *Hall Manufacturing Co. v. Hazlitt*, 11 Ont. A. R. 749, the plaintiffs had sold to Usborne & Co. certain wheels to be used in their manufactory under a written agreement by which the property should not pass until the goods were

paid for, and that the right of possession should be forfeited and plaintiffs should be at liberty to resume possession in case of default in payments. Usborne & Co. placed the machinery in the flume belonging to their factory, which they held under lease from the defendants. The sheriff having seized other chattels of Usborne & Co., they surrendered the lease to the defendants, from whom plaintiffs demanded the wheels, default having been made by Usborne & Co. The defendants refused to give up the wheels and they were sold under proceedings to enforce mechanics' liens. It was held that plaintiffs were entitled to recover. Burton, J. A., referred to the contention that the stipulation that the property should not pass until paid for could be of no avail where, from the nature of the property, the vendor must have known that in order to be made use of it must necessarily be built into and become part of the building and would then fall within the rule *quidquid plantatur solo solo cedit*. The answer was that here the tenant had no property in the wheels and could not convey what he did not have. The finding at the trial as to the plaintiffs' right to the property was correct, and the demand and refusal were sufficient to entitle them to maintain the action against the defendants, who were asserting a right to prevent the plaintiffs from exercising their right to sever and remove the fixtures. Osler, J., concurred in this judgment, saying "the subsequent voluntary surrender, for there was no forfeiture,—could have no effect in defeating the plaintiffs' right, as is shown by the case of the *London and Westminster Loan Co. v. Drake*, 6 C.B.N.S. 798, and other cases referred to in the judgment below. As between Usborne, the plaintiffs, and the defendants, the wheels still remained fixtures or chattels removable in the terms of the agreement, and never became, as contended, part of the freehold." Referring to the "crux" propounded in one of the grounds of appeal, in these terms,—“the plaintiffs' proposition of law may be stated baldly as follows: A, a contractor, steals nails from B and uses them in building C's house. B demands from C the right to remove the nails. On refusal B has a right of action against C for the value of the nails”; Osler, J., said that the proposition was not applicable where the question

was one of the removability of fixtures not intended in any event to become part of the realty; citing *Wake v. Hall*, 8 App. Ca. 195, 203, and *Thomas v. Inglis*, 7 O. R. 588.

This case was followed in *Polson et al. v. Deeger et al.*, 12 O. R. 275 (1886), in which an engine, boiler and other machinery were shipped by plaintiff to defendant Ellis, the machinery to be at the risk of Ellis, who should insure it, assigning the policy on demand to the plaintiff "and the "title thereof shall not pass from you," (the plaintiff). The machinery was put up in a mill on premises leased with right of purchase by the defendant Deeger to the wife of Ellis, who died, leaving her husband sole executor, with power to sell and dispose of her property. He released to Deeger all his and her interest in the premises, together with the mill, and Deeger on the same day leased the premises to Ellis for one year. The mill was then mortgaged to the other defendants, a loan society. The price of the machinery was never paid, and it was held that the property was still in the plaintiff, and was illegally detained by Deeger and Ellis. "There is no doubt," said Cameron, J., "that when this machinery was placed in the mill, it "was the intention of Ellis that it should be a permanent "improvement of the realty, the mill property; and therefore, it would, if he had been the owner of the machinery, "have passed under the release to Deeger. But it has not, "and he could not by his act deprive the owner of it."

Reservation of property till paid for, in wheat to be ground into flour. Mixture. A quantity of wheat was bought by Merton & Co., on commission for F. D. Cummer, and paid for by Merton & Co., with their own money. They shipped it by rail, taking the railway receipt in their own name, as consignees, which they endorsed to the bank, through which they drew on F. D. Cummer for the price at fifteen days' sight, the railway receipt being held as collateral security for the draft which was discounted by the bank. The understanding of all the parties was that the wheat was being sent to Waterdown to be ground into flour, and it was there delivered to Cummer, brother of F. D. Cummer, mixed with other wheat, and ground, and fifty-five barrels of flour, the equivalent of the wheat, were delivered to the railway company for

F. D. Cummer, who became insolvent before the draft was payable. Merton & Co. paid the draft and got the railway receipt reindorsed to them. It was held that they were in as of their former title, and not as assignees of the bank, with the right given to the bank by statute, and that the railway company, sued by F. D. Cummer's assignee for conversion of the flour, could set up the right of Merton & Co. in privity with whom they were defending the action. It was also held that the conversion of the wheat into flour made no difference, because, although the flour was not made from the identical wheat delivered, under the usual course of business in such matters the flour should be regarded as the produce of the wheat. The case proceeds largely upon the intention of the parties, as inferrible from their conduct. Richards, C.J., puts the case against the claim of Merton & Co., saying that, "it is true, if we apply strictly technical rules to interpret the intention of the parties, and construe the matter so as to make them prevail against the obvious intention of the parties, we may hold that the interest was bought for and sold to F. D. Cummer, that Merton Brothers only had a lien for the purchase money; that when they allowed it to go out of their possession and to be manufactured into flour, they lost their lien; when the bill of lading was assigned to the bank on discounting the draft, a special lien and property in the wheat passed to the bank under the statute, and when the acceptance for the payment of which the bank had a special lien was paid the lien of the bank was removed and Merton Brothers had no claim on the flour, and therefore the assignees of Cummer can claim the property." He thought the court was not compelled to take so narrow a view of the transaction. The obvious intention was, in his view, that the wheat should remain the property of Merton Brothers until paid for by F. D. Cummer. Although Wilson, J., dissented in an exhaustive judgment, it is difficult to see why this case does not come clearly within the principle that where the carrier gives a bill of lading, he becomes a bailee for the person named in the bill of lading. The railway receipt here was taken in the name of Merton Brothers, as consignees; it was indorsed to the bank to protect the property until the

draft was accepted or paid, according to the intentions of the parties; it was held by the bank, the draft not being paid, and was re-endorsed to Merton Brothers on their payment of the draft. It was never endorsed to Cummer and under the rules as to *jus disponendi*, the railway company never became a bailee for Cummer. The case seems quite plain, so far as this aspect of it is concerned. The more difficult question arises out of the want of identity in the property. That point is disposed of by the reasoning that when wheat was brought to a mill to be ground, an equivalent amount of flour should be considered by all the parties as the product of that wheat, although, in fact, perhaps not a grain of the wheat delivered aided in producing the flour received for it, it being physically impossible in many instances, as the mills are conducted, that the wheat delivered and that only should produce the flour given for it. "This," said Richards, C.J., "I believe, is now well understood when flour is set apart as the produce of the wheat. All parties interested are properly considered as concurring in this view, and I think we ought so to hold." The difficulty, if any, arising from want of identity was not in this case the defendants' difficulty in any possible view of the matter. Assuming that the flour was the produce of the wheat delivered, it was, under the ruling, Merton Brothers' flour. If it was not the produce of the wheat delivered by Merton Brothers, under what title could the plaintiffs claim it? Their own case was that it was the produce of the wheat sold to Merton Brothers. *Mason, Assignee of F. D. Cummer, v. Great Western R. Co.*, 31 U. C. Q. B. 73 (1871).

Part payment under entire contract does not entitle purchaser to possession of any portion of goods sold. This may be gathered from the case of *Butters v. Stanley et al.*, 21 U. C. C. P. 402 (1871), in which the contract was for 5,250 bushels of wheat, the purchase price of which would be \$3,780. The wheat was to be delivered in bags to be supplied by the purchaser, and free on cars to be supplied by them also. The bags were furnished and filled, but there were no cars furnished, and afterwards the wheat in the plaintiffs' bags was sold to another purchaser, the delivery of this being more convenient than of other wheat. There

was an ample quantity left in the bins to supply the plaintiff. It was held, under these circumstances, that the plaintiff was not entitled to possession of the wheat and could not maintain trover against the defendants, to whom it had been delivered. Gwynne, J., said, "If this case turned upon the proper answer to be given to the question, whether or not the fact of Armitage & Co. (the vendors) having filled bags supplied by the plaintiff with wheat, and having weighed all or any part of such bags, passed the property to the plaintiff in the wheat in the bags which were weighed, I should require time for further consideration before I could, upon the evidence given in this case, answer that question in the affirmative. It would depend upon the intention of Armitage & Co., and as at present advised, I must confess that the evidence given as to the filling of the bags and weighing the wheat put into them appears to me to be quite consistent with Armitage & Co. having done that for the purpose merely of convenience and to have the wheat ready for delivery when the plaintiff should come to complete his contract by the payment of the balance of the purchase money, and quite consistent with Armitage & Co. intending to retain their property in the wheat until such balance should be paid. But the plaintiff in this action is not entitled to recover against these defendants in this action unless at the time that Armitage & Co. gave the wheat in question to the defendants in fulfillment of a contract of sale previously made with them, the plaintiff had not only the right of property in himself, but also the right to immediate possession of it as against Armitage & Co., unless in fact Armitage & Co., by the act of delivery to the defendant, became liable to the plaintiff for the wrongful conversion of his property." The plaintiff had no such right, because the contract was an entire contract, and Armitage & Co. would have a right to hold the \$900 as a security that plaintiff would take the whole fifteen carloads. Plaintiff had no right that the vendors should deliver to him so much of the wheat as would represent the \$900.

Question for jury whether the delivery was with condition not to pass property till paid for. In Smith v. Hobson,

16 U. C. Q. B. 368, some horses and other property were put up at auction under the terms that purchasers should give joint notes with sureties before taking the property. Defendant purchased property, and came next day, when it was agreed that, instead of a joint note, he should give his own notes at three, six and twelve months, with an endorser. Under promise to give such notes, he was allowed to take the property away. The contention being made that the plaintiff's only remedy was an action for not giving the notes, it was left by Hagarty, C.J., to the jury to say whether the delivery was with the intention to pass the property, or defendant was merely allowed to take possession, on condition that he should furnish the notes, the plaintiff reserving to himself the right to reclaim the horses if the money was not paid or the notes furnished. A circumstance mentioned in the judgment, and not adverted to in the statement of the case, helps out the theory of a mutual intention that the property should not pass. When the defendant found that he could not get an endorser, he returned the wagon, which went strongly to show that he was conscious he was bound to return the property. "All must depend on the understanding between the parties. In general (plaintiff) would be left to his action for the price either on the special agreement for payment in a particular manner, when there was one, or otherwise upon an implied assumpsit for the value. But when goods are suffered to be taken possession of by the vendee, not as of right and with the intention that the property shall vest in him, but conditionally, upon the understanding that he is to pay or secure the price in a certain manner, or else return them, then a breach of the condition revests the property in the vendor and gives him a right to claim its restitution." The case went to the jury with the proper direction, and they found expressly that the delivery of possession was but conditional.

In a somewhat similar case, the property was held to have passed, and as the possession had been given up, there was of course no lien. The sale was of lumber, to be delivered at Bronte Station, on the Great Western Railway, to be paid for as shipped from the station by the

vendee, which he was to do as fast as the vendors could haul it there. On the making of the agreement the vendee paid \$1,000 on account of the purchase money. At first it was shipped away as fast as it was delivered at the station, but afterwards more slowly. With the knowledge of the vendor and without objection, the vendee culled, measured and piled the lumber and marked it with his initials leaving it in charge of the station master, who, on his directions from time to time, shipped large quantities of it. About six weeks before the purchaser's insolvency, one of the vendor's firm requested payment for the lumber lying at the station, when the vendee put him off, and said, "You are all right anyway. You have the lumber there at Bronte Station." It was held that the property had passed upon delivery at the station. "I do not think," said Wilson, J., that the "statement made by the vendee to the defendants, who "were pressing him for payment, and were desirous of "ascertaining if he was in solvent circumstances, 'You are "all right anyway; you have the lumber there at Bronte "Station,' and nothing done upon it, conferred any right "upon the defendants. It was used as evidence that the "plaintiffs had never lost their original lien; but it does "not appear to me that, on the facts of this case, which "show that the lien was completely parted with and "abandoned, it can be resuscitated and established, as if "it had never been given up by such a conversation as the "one relied on." *Mason v. Hutton*, 41 U. C. R. 610.

Payment a condition precedent to right of possession. In *Rogers v. Devitt*, 25 O. R. 84 (1894), the plaintiff was mortgagee of one to whom the defendant had agreed to deliver wood at a specified price. The wood had been got out and appropriated, and the appropriation assented to so as to pass the property, but it had not been paid for, and it was held by the Queen's Bench Division, Armour, C.J., delivering the judgment of the court, that no action of trover could be maintained for want of the right of immediate possession. *Gordon v. Harper*, 7 T. R. 9, is cited to the effect that "the buyer or those who stand in his place may still obtain "the right of possession if they will pay or tender the "price, or they may still act upon their right of property "if anything unwarrantable is done to that right. If, for

“ instance, the original vendor sell when he ought not,
“ they may bring a special action against him for the injury
“ they sustain by such wrongful sale, and recover damages
“ to the extent of that injury; but they can maintain no
“ action in which the right of property and right of pos-
“ session are both requisite, unless they have both these
“ rights. Trover is an action of that description; it re-
“ quires right of property and right of possession to
“ support it.”

Payment to a third party at vendor's request. In *Brady v. Harrahy*, 21 U. C. Q. B. 340, the plaintiff had agreed to purchase a lot of land and afterwards agreed with the defendant to sell him five hundred cords of wood at 3s. 9d. By another agreement he engaged a person to cut the wood for him at 2s. 6d. per cord, and the defendant agreed with the plaintiff to pay the 2s. 6d. to the person who was to cut the wood, and the 1s. 3d. to the owner of the trees. The money was paid for the cutting, and it was held that this was as much a payment on account of the price of the wood as if it had been made to the plaintiff himself.

Construction of agreement as to time of payment. In an agreement for the purchase and sale of timber it was provided that the timber should be delivered “ free of charge
“ where they now lie within ten days from the time the ice is
“ advised as clear out of the harbour, so that the timber may
“ be counted. . . . Settlement to be finally made inside
“ thirty days in cash less two per cent. for dimension timber.” It was held that the last clause did not give the purchaser thirty days for the delivery; that it provided for delivery and payment within thirty days from the date of the agreement. If the delivery was accepted after the thirty days, which was not contemplated by the parties, the price should be due at once. *Victoria, Etc., Lumber Co. v. Irwin*, 24 S. C. R. 607.

Sale at six months' credit on approved notes means an absolute credit for six months. In *Wakefield v. Gorrie*, 5 U.C.Q.B. 159, a sale was made by auction on the terms that as to amounts over thirty pounds purchasers were to have six months' credit, giving approved notes. It was held that the vendor could not sue for goods sold and delivered on refusal to give the notes, that the credit was an absolute

credit for six months, that the vendor could have refused to deliver the goods before getting the notes and could sue for goods sold and delivered after the expiration of the credit. The only action that could at once be brought would be an action for not giving the notes, to which under the then statutes of the province no set off could be pleaded.

Res perit domino; time of the essence of the contract. A long judgment in the Error & Appeal Reports, Vol. 1, p. 445, affirms the principle that where the goods the subject of an agreement for sale perish before the property has passed to the purchaser, the loss falls on the vendor. *Coleman v. McDermot*, 1 E. & A. 445. The flour was to be delivered by the first of June, and as to this, it is said there can be no doubt that in all such cases, time is of the essence of the contract. "The lapse of a single day, the arrival "of a packet, may produce a change in the flour market "very injurious to holders and to those who are under "contract to deliver under certain specified prices. The "trade could not be carried on with safety unless the "parties were allowed to insist upon strict punctuality as "to the time of delivery."

Res perit domino. Rule qualified. As a general principle, the enquiry upon whom the loss occasioned by inevitable accident will fall can be determined by asking the question, whose is the general property in the goods; and the enquiry usually therefore is as to the precise point of time at which the property passes from the vendor to the purchaser. But there are exceptions to this rule. In *Hesselbacher v. Ballentyne*, 28 O. R. 182, the defendant was under contract to deliver pulp wood in the form of logs at the mouth of the Thessalon River. The logs were placed in the river, mixed with other logs which were to be there in contemplation of the parties, it being within such contemplation necessary for the plaintiff to select from the mass such logs as answered the contract, leaving those that did not. It was also in contemplation of the parties that some logs would be taken out of the boom that would not be the subject of sale, but could not be rejected until the logs reached their destination. It was assumed by the trial judge on an inter-pleader issue that the property had not passed to the vendee, although he would not say that it

might not properly be found that it was the intention of the parties that the property should pass. The possession, however, had passed to the vendee, and a loss occurred while the logs were in his possession, through no fault of the vendor, and the judge thought that it was contrary to natural justice that the purchaser should not pay for the logs which were lost under these circumstances.

This is a decision of a single judge, but the authority is cited in the case of *Sawyer v. Pringle*, 18 O. A. R. 218, where Hagarty, C.J.O., said: "It might be plausibly argued that where there was an executory agreement for a future sale, on the performance of certain named conditions by the purchaser, and the vendor had taken the property out of the possession of the purchaser, and while in the vendor's possession it had been destroyed, without any default on his part, as by accidental fire, that the vendor was not thereby debarred of recovery."

But in the case referred to it is not clear that Hagarty, C.J.O., was not speaking of a case where the general property had passed to the purchaser, and the vendor was exercising special authority to resume possession on the non-payment of the price. American cases are cited, however, where the sale was conditional and the defendant had promised to pay stipulated sums at times certain, and it was held that the destruction of the property by fire did not excuse the payments. On the strength of these cases, it was held that the loss of the logs by the breaking of the booms and otherwise must fall on the purchaser.

In *Goldie & McCulloch Co. v. Harper*, 31 O. R. 284, a sale was made under terms of a special agreement that no property should pass until payment of the notes given for the price. In an action on one of the notes it was held that the destruction of the property did not prevent recovery on the notes, that the defendant having had the use of the machinery and an interest in it, there was not a total failure of consideration, or a partial failure which was ascertained. Thus it was not necessary to determine the question as to the incidence of the loss, but the tendency of the case is in favor of holding that the loss should fall on the purchaser. Per Meredith, C.J.: "It would be an extraordinary thing, it seems to me, the machinery having been put in, and

“ some parts of it having been attached to the freehold,
“ that it would be possible to contend that the case is one
“ governed by the principle which Mr. Aylesworth invoked,
“ and that if the property be destroyed, the vendor of it
“ would not be entitled to recover at all, but must lose the
“ whole of the purchase money.”

No right to select goods to be supplied. Parol evidence inadmissible to add terms. Plaintiff agreed to purchase rails from the defendant. The contract was made through agents, and the note signed by the defendants did not refer to any particular section. Upon the sale being communicated to the plaintiffs, they signed a confirmatory note, adding the words that “ the make should be either Ebbwvale “ or Moss Bay,” and wrote across the face that the rails were to be fifty-six pounds, ordinary section and specification. This note was not communicated to defendant until after action brought. Defendants proposed to send rails known as Hamilton and North-Western, which came within the terms, “ ordinary section,” but plaintiff insisted upon a section called Sandburg, which also came within the term ordinary section. It was held that the plaintiffs had no right of selection, i.e., that the defendant had fulfilled his contract by supplying, or being ready and willing to supply, Hamilton and North-Western rails. There being no evidence of any usage to qualify the rights of the parties, evidence was held inadmissible to add a term to the contract that the plaintiff should have the right to select the section. *Page v. Proctor*, 5 O. R. 238.

Tender of goods not necessary where defendant has refused acceptance. Plaintiff recovers whole value of the goods where right of possession transferred to purchaser, although contract stipulated property to remain in vendor until payment of note for price. In *Tufts v. Poness*, 32 Ont. 54, the contract provided for the payment of the price of the goods by promissory notes, and the property in goods was to remain in the plaintiff until the notes were paid. Defendant was continuously refusing to receive the goods and upon an untenable ground of objection, but the goods were shipped and drafts and notes forwarded for the price. It seems that a contention was open to the defendants that the goods had not been shipped as soon

as they should have been, but the defendant had at an earlier stage repudiated his liability by saying that he would not accept them, and this at a time when there was no default in delivery, and it was held that this refusal was a waiver of the plaintiff's duty to ship earlier. As the head-note states, the defendant having refused to perform his contract on the 15th of June, at which date he did not contend that there had been default on the plaintiff's part, and his refusal remaining uncontradicted down to the time of the arrival of the goods in July, his right to require tender at the date fixed for the performance of the contract was waived.

The judgment is that of the Divisional Court, Street, J., saying (32 Ont., p. 54): "I am of opinion, further, that the plaintiff is entitled under the circumstances to recover the full price of the goods, upon the ground that the right to the possession of the goods having been transferred by the plaintiff to the defendant, the plaintiff has done all that he was required by the contract to do to entitle himself to the payment of the price. He shipped the goods to the defendant direct, and they were, and for all that appears to the contrary, still are, ready for the defendant at the railway freight station in Windsor, had he chosen to claim them. The plaintiff had put them out of his own control and under the control of the defendant. The stipulation in the contract by which the property of the goods was to remain in the plaintiff during the term of credit, notwithstanding the delivery of possession to the defendant, and the fact that the plaintiff has given up possession to the defendant, so far as he can, takes the case out of the general rule which prevents a vendor recovering the price where he has not parted with the property in the goods."

Delivery in instalments under entire contract, where no time of payment mentioned. Consequences of refusal to make further deliveries till previous deliveries paid for. *Boyd v. Sullivan*, 15 O. R. 492 (1888), was decided by the Chancery Division Court of Ontario before Boyd, C., and Ferguson and Robertson, JJ. The contract was for the sale of lambs and cattle, and was as follows: "Please deliver me at Port Arthur five good head steers on first City up,

“ and six steers and heifers on second trip *City* up, and “ four cows on same trip; also 100 good lambs, in lots of “ fifteen or twenty, at \$3.00,” etc., etc. The purchaser was a butcher and was buying his fall supply of meat. Armour, J., held that by the terms of this contract the price was payable on each delivery, and that the defendant having refused to pay for any of the goods purchased till the whole was delivered, the plaintiff was justified in refusing further deliveries, and of course in suing for what had been delivered. This was reversed on appeal, the court holding that no payments were due until all the goods were delivered. There was nothing said in the contract about payment. There was no ground for any inference that the defendant was to pay for each shipment of goods, and the case therefore differed wholly from the old and leading case of *Withers v. Reynolds*, where the hauling of the straw was to be paid for load by load, and the defendant insisted on keeping one load unpaid for throughout the whole performance of the contract. This was not only a breach of the contract, but such a breach as discharged the plaintiff and enabled him to sue on a *quantum meruit*. In the present case the court discussed the consequences of the breach by plaintiff of his contract to deliver, and held that it did not go to the whole of the consideration, and was one that could be satisfied by damages, “ hence, the defendant “ was liable to pay for the part of the consideration that “ he had received, and the plaintiff became liable to answer “ in damages to the defendant for the breach.” Per Ferguson, J. This does not seem logical. If the breach did not go to the whole of the consideration, that would be a good reason for holding that the contract was not discharged by such a breach, and the logical consequence would be that if the plaintiff had tendered later performances the defendant could not have refused them. But if the contract was entire, as the court held, and no payments were due until all were delivered, it is not logical to hold that the plaintiff could entitle himself to be paid before that time by simply refusing to perform his own obligations under the contract. If the defendant had failed to perform his part, and the breach had been such as to go to the root of the contract and discharge the plaintiff, the latter could

then have sued for the part delivered on a *quantum meruit*. Here the plaintiff is allowed to break his contract with the defendant, and by that act so discharge the contract as to enable himself to sue on a *quantum meruit*. This is not logical, but Chancellor Boyd appositely cites the high authority of Parke, J., in *Oxendale v. Wetherell*, 9 B. & C., 387, that "where there is an entire contract to deliver a large quantity of goods consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of the time, bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered." "It follows," says Boyd, C., "that where there has been a partial delivery and consumption of that part, and failure to perform the rest of the contract, the seller would have the right to sue as upon a *quantum meruit*, and the purchaser would have his cross-action or counter-claim for damages." The result is no doubt equitable, although not logical. The doctrine has been repudiated by the New York courts as resting on no solid foundation, and in effect enabling the courts to alter the terms of contracts. Per Church, C.J., in *Kerr v. Tupper* (1873), 52 N. Y. 550.

Place of delivery. Where coal was contracted for to be delivered at the coal shed, and the vendor proposed to deliver, and did deliver a portion of it at a dock eighty feet from the shed, and separated from it by a road, so that it would cost ten cents a ton to transport it to the shed, this was held not to be delivery in accordance with the contract. *Town of Goderich v. Holmes*, 32 S. C. R. 211.

Delivery, where to be made. In *Stewart v. Atkinson*, 22 S. C. R. 315, a sale of lumber was made of guaranteed quality, to be delivered f.o.b. vessels in Quebec, the payment by draft on London. The deals were inspected in London and found of inferior quality. Held that the delivery was to be at Quebec, subject to an acceptance in London, and that the purchasers were entitled to damages for inferiority of quality.

Purchaser pays extra freight caused by change of destination at his request. The contract provided for the delivery at a Boston point, that is a point to which the same charges for transportation were made as for transportation to Boston. After the contract was made, the plaintiffs requested the goods to be sent to a different point, expecting to pay five cents per pound additional freight. The actual charge for the additional cartage was largely in excess of this amount. Plaintiffs were held bound to pay this additional amount, as it was caused by their changing the destination of the goods. It happened that the point to which the goods were sent was a Boston point by one of the possible routes, but defendant had requested plaintiffs to ship by a different route on which it was not a Boston point. *Symmers v. Livingstone*, 10 O. A. R. 355.

Materiality of stipulation as to mode of consignment. The Court of Appeal of Ontario was equally divided on a question as to the materiality of a stipulation that a quantity of lambs purchased by plaintiff should be consigned to plaintiffs' firm at Buffalo. The trial judge found that it was agreed between the parties that the lambs should be consigned to the firm named by him as consignees, the facts being that it was a new firm, and that the plaintiff had an object in so having the consignments made, as it would show others that the consignors had confidence in the firm's business integrity and ability. He also found that the materiality of the stipulation was known to the defendant at the time he made the contract. Under these circumstances, the Chancery Division held that the manner of consignment was a material term of the contract, and the defendant, having disregarded this term and shipped the lambs to another name, plaintiff was justified in refusing delivery and claiming back a deposit on the price, and damages. The Appeal Court, as already stated, was equally divided, and seems to have given no reasons. Hagarty, C.J.O., and Osler, J.A., considered that the stipulation was material, but Burton and MacLennan, JJ., held that it was merely collateral to the contract, because the contract was with reference to specific goods.

Place for inspection is where goods are to be delivered, unless general custom to the contrary. A contract was

made in New York by bought and sold notes for the sale by parties in New York to parties in Canada of certain wools. Assuming that the sale was a sale by sample, and that the purchaser had a right to inspect the goods before paying for them, to ascertain their correspondence with the sample, it was held that this inspection must be made in New York, and that the buyers could not insist on the goods being sent to Canada for inspection. Evidence was given of the usage of particular firms, as to this, but the evidence was regarded as strictly irrelevant. Even a mercantile custom prevailing generally in Canada would not affect the New York merchants selling goods in New York, and not shown to be cognizant of any such Canadian usage. *The Trent Valley Woollen Mfg. Co. v. Oelrichs & Co.*, 23 S. C. R. 682 (1894).

Same subject. Where purchaser omits inspection at proper place, he cannot reject afterwards for inferiority. Must bring cross-action. In *Towers v. Dominion Iron and Metal Co.*, 11 O.A.R. 315 (1885), a sale was made by sample of goods to be delivered at St. Catharines. The purchaser did not inspect them there, but on their arrival at Cincinnati, to which place defendants had the goods consigned; they there inspected them and rejected them for inferiority. This it was held they could not do. The proper place for inspection was the place of delivery. There the purchaser could have rejected them, if inferior to sample. Under special circumstances, such as in *Heilbutt v. Hickson*, L. R. 7 C. P. 438, where the latent defect could not be discovered at the place of delivery, or in *Grimoldby v. Wells*, L. R. 10 C. P. 391, where delivery was made midway on the journey from the vendor's place to the purchaser's, there would be a right of inspection and rejection at a place other than that for delivery under the contract, but in the absence of unusual circumstances the inspection must be made at the place appointed for delivery, and in the present case the defendants were precluded from the right of rejection, and driven to their cross-action for the breach of the implied warranty.

Dymont v. Thompson, 12 A. R. 659 (1886), is to the same effect. There the lumber contracted for was to be delivered f.o.b. on cars at the plaintiffs' mills, to such places

as defendants should direct, and it was held that the inspection should be made at the mills, and the lumber could not be rejected at Hamilton, where defendant carried on business.

The parties may of course agree that the inspection is to take place elsewhere than at the place of delivery, as in *Goodall v. Smith*, 46 U. C. Q. B. 388 (1881), and in that case the express agreement controls the general principle. In the case cited, it was held, under the circumstances, that the shipment of one car without inspection was not a waiver of the requirement that the inspection should be at Lansdowne and not at Toronto, the place of delivery.

In *Ballantyne v. Watson*, 30 U. C. C. P. 529 (1880), it was held that even though inspection might be a term of the contract, this was chiefly for the plaintiffs' protection, and he might waive it.

Place of inspection. Right to reject for inferiority. In *Lewis v. Barry*, 14 Man. 32, the contract was for the sale of butter then manufactured, and also for all butter to be manufactured during the season, quality to be fine, delivery to be f.o.b. cars, Birtle. Purchaser carried on business at Winnipeg. No inspection took place at the time of the contract. The vendor shipped a carload, at purchaser's request, to Winnipeg, which the purchaser refused to accept because of defect in quality. Vendor resold and sued for the difference between the contract price and the amount realized. Held, that the agreement as to quality was a condition of the contract; secondly, the property in the butter had not passed; thirdly, the place of inspection was Winnipeg; fourthly, that purchaser's duty depended upon the quality of the butter; fifthly, that the fact that purchaser had accepted other carloads of inferior butter did not bind him to accept one that was not according to the condition. *Dyment v. Thompson*, 9 O. R. 566, 12 A. R. 658; sixthly, that the onus was on the vendor to prove the quality of the butter; seventhly, that such evidence could not be given in rebuttal.

Removal from car to premises does not destroy right to reject. In *Creighton v. The Pacific Coast Lumber Co.*, 4 Terr. 146, it was decided that where a vendee unloads goods from a car on arrival, and teams them to his own premises,

if he then finds that they are inferior to what he had ordered, and notifies the vendor in a reasonable time, he has not so accepted the goods as to estop him from rejecting them because of non-compliance with the order.

Deterioration in transit. Who bears it. In *Winnipeg Fish Co. v. Whitman Fish Co.*, 41 S. C. R., 453, the respondents sold a carload of fish to the appellants, to be shipped, in winter, from their warehouse at Canso, Nova Scotia, f.o.b., Winnipeg. The sale of the carload in question was by sample, and the sample was sound and satisfactory. When the fish arrived they were frozen, and so continued for six weeks, the atmospheric conditions being such that they could not deteriorate in the meantime. When tried, they proved unsound, and were returned by customers. It was held on appeal, reversing the decision of the Manitoba Supreme Court, that the appellant defendants must succeed on their counter-claim for damages on breach of warranty that the fish were according to sample; that any loss occasioned by deterioration in course of transit, not necessarily incident to the course of transit, should be borne by the sellers, and that the loss in the present case was not so incident. It was also held that the purchasers had notified the vendors in reasonable time under the circumstances. The case of *Beer v. Walker*, 46 L. J. C. P. 677 (the Ostend rabbits case), was held applicable by Sir Charles Fitzpatrick, C.J.

No examination was made of the fish on their arrival at Winnipeg and their delivery to the defendants. Such an examination could not have been made without thawing out each box of fish, and the defendants adopted what Sir Louis Davies said was the usual and customary method of selling frozen fish to customers, who would properly and effectively determine their true condition by thawing out and cooking the fish. This, of course, involved some delay in determining the character of the fish, and the defendants' contention was that there had been undue delay and a dealing with the fish inconsistent with the ownership of the seller. The Sale of Goods Act was in force in Winnipeg, but there was no suggestion that as respects the point at issue the Act was anything more than a codification of the common law.

Sir Louis Davies sums up his conclusions in respect to the matter in the following terms: "That the sale was one
" by sample. That the risks of deterioration in the fish
" necessarily incident to the course of transit fall under
" Section 33 of the Sale of Goods Act upon the purchaser,
" and all other risks upon the seller, and that assuming the
" goods to have been delivered to the carrier at Canso in
" good and suitable condition, as found by the Court of
" Appeal, and upon which I do not express any opinion,
" any damage causing deterioration to the fish arising
" from their having been frozen and thawed during transit,
" not necessarily incident to the transit, must, under the
" circumstances of this case be held to have been accidental
" and exceptional and so must fall upon the seller."

Buyer of property not passing until price paid, sells to another. Vendor must demand before suing in trover, sub-vendee being rightfully in possession. While the purchaser under a conditional sale, the property remaining in the vendor until the price is paid or some other condition is performed, cannot transfer any better title than he himself has, unless the vendor has done something to make a title by estoppel,—yet a transfer from the buyer to another is legal. Goods were delivered to one Condon under a special contract that until paid for they were to remain the property of the vendor. Condon sold the goods before they were paid for, and the purchaser did not know anything about the claim of the original vendor. Wilson, C.J., speaking for the Court of Common Pleas, Ontario, said that, "the defendant was guilty of no actual wrong in buying the articles from Condon. He was entitled to have a demand made for them before the action was brought. He had a right, too, to buy Condon's interest in the goods." *Tuffts v. Mottashed* (1879), 29 U. C. C. P. 539.

Caveat emptor and estoppel. Some cases are inserted in the Ontario Digest in which the maxim "*caveat emptor*" was applied, for which it is difficult to find a proper place in this volume. In *Thompson v. Nelles*, 4 U. C. C. P. 399, a merchant was accustomed to deliver cloth to a tailor to be made into coats for him. The tailor was also in the business of exhibiting and selling coats on his own account. He sold some of the plaintiff's coats to a customer, who

supposed he was buying the tailor's coats. It was held that the maxim "*caveat emptor*" applied, and that the purchaser could not get a title from the tailor; *nemo dat quod non habet*.

In another case, a land-owner agreed to sell land to B., who failed to pay for it, and it was sold over his head to another party, B still remaining for a time in possession. and cutting logs, which he sold to C., the logs so sold having been cut after the conveyance. The purchaser of the land ejected B and notified C to pay no more money to him for the logs. B sued C for the price, when these facts were set up and held to be a good defence. "Although the general or "*prima facie* rule is that an agent, bailee or vendee cannot resist his principal or dispute the title of the bailor or vendor, still if a paramount owner steps in and forbids the bailee returning the goods at his peril, or the vendee paying the price, and the bailor or vendor had no right or title, it appears to me that the bailee or vendee may then resist the principal. He does not, nor could he do so of his own mere motion, but where a third party intervenes, such party being the true owner, the defendant may set up the *jus tertii* as a defence." *McMahon v. Grover*, 3 U. C. C. P. 65.

Property by estoppel. In *People's Bank of Halifax v. Estey*, 34 S. C. R. 429, the People's Bank were owners of a quantity of logs in the possession of a boom company, and agreed to sell them to one McKendrick, one of the terms of the agreement being that the property should remain in the vendors until the payment of the price. They accordingly gave an order to the boom-keeper to deliver to McKendrick. The defendant Estey being desirous of purchasing the logs, telephoned the bank asking if they had the logs for sale, to which the manager replied. "No, I have sold them to McKendrick." Upon receiving this information, Estey purchased some of the logs from McKendrick, against whom the bank, not having been paid by McKendrick, asserted their right on the agreement that the property should not pass until paid for, by bringing an action of trover against Estey. It was held by the majority of the court, concurring in the judgment of the Supreme Court of New Brunswick, that the bank was estopped from asserting title to the logs against the de-

fendant. Per Sir Elzear Taschereau, C.J.: "In common parlance, for one to say that he has sold his property without adding a word more means that he has parted with all his interest in it. . . . White, the bank manager, was not obliged to speak at all, but when he did speak he had no right to mislead Estey by telling him what would reasonably lead any intending purchaser to believe that if he wanted to buy he had to go to McKendrick." There was a powerful dissenting opinion by Nesbit, J., concurred in by Killam, J. In the dissenting opinion it is pointed out that White had no reason to suppose that Estey was asking for information upon any point except as to the question whether the bank was or was not in a position to sell him the logs, and he had given as to this the very information that was sought. The question suggests itself whether White had not a right to assume, if it was in his mind that Estey wished to buy the logs, that he would, upon application to McKendrick, be informed of the fact as to McKendrick's title. Could White be supposed to assume that McKendrick would defraud Estey by representing the logs to be absolutely his own when in fact the property was to remain in the bank until they were paid for?

Free on board. Meaning and effect of this phrase. Purchaser need not pay until goods are on board. Per Robinson, C.J., in *George v. Glass*, 14 U. C. Q. B. 519 (1857), "It is clear that before the defendant" (purchaser) "could be legally called upon to pay for the flour, he had a right to see that the article really was where it was reported to be, and that it was of a proper quality, and moreover, he had a right to see it free on board. But this is not an action for the price, nor an action charging the defendant with any breach of his engagement in not paying the money upon the production of the warehouse receipt and delivery order." The action was for not accepting, and under the facts of the case it seemed clear that the purchaser was endeavoring to get rid of his bargain, the vendor being ready and willing to go on with the delivery under the terms of the contract.

In *Clark v. Rose*, 29 U. C. Q. B. 302 (1870), under a contract to deliver 10,000 bushels of oats "at 40 cents per 34 pounds, free on board at Kingston," it was held that the

purchaser was not bound to pay or tender the price before requiring the seller to put the oats on board. The dictum in *George v. Glass*, just quoted, was referred to by Draper, C.J., of the Court of Appeal, with approval, as establishing that the defendant could not have maintained an action for the price until he had delivered the oats free on board; "neither can he maintain this defence on the ground that he was not paid until he had so delivered them." The performance of the contract to deliver free on board was, he held, an indispensable preliminary to a rightful demand of payment. As to the objection that vendor would, under this rule, have to part with his property without payment, he said: "The parting with the possession and control of the property, or the symbol of the property, would not be requisite on the defendant's part before payment, because the mere shipment would not divest him of the property; he would hold the bill of lading, as shipper, and could transfer it simultaneously with the receipt of payment." On the same point, Galt, J., said: "It was insisted upon in the argument before us that it was unreasonable to expect that the defendant should place his property on board a vessel chartered by the plaintiff before he had received the price, but it seems to me much more unreasonable to expect the plaintiff to part with his money before the oats had been placed on board the vessel."

It is the duty of the buyer, under a contract to deliver free on board, to provide the ship or other conveyance, but the vendor must pay the cost of shipment, "and all port and harbor charges, such as canal duties, wharfage, etc." This was held by Harrison, C.J., in *Marshall v. Jamieson*, 42 U. C. Q. B. 115 (1877), to have been established by the cases, some of which are referred to in the foregoing paragraphs.

Duty of vendee to provide shipping, even where goods sold "free on board." The duty of the vendor, under a contract by which he sells goods "free on board," extends to the payment of all port and harbor charges, but the buyer must provide the ship. This was held in *Marshall v. Jamieson*, 42 U. C. Q. B. 115 (1877), in which a number of cases are cited, and the point is treated as well settled by

authority. The same rule extends to a shipment by rail, and in this case it was held to be the duty of the buyer to provide the cars for the shipment. Not having done so in a reasonable time, he could not recover for the non-delivery of the wheat sold. Where the purchaser had no shipping ready to take the goods on board at the time agreed upon for delivery, it was treated as a plain case in *Howland v. Brown*, 13 U. C. Q. B. 199 (1856), that he must pay all the warehouse charges after the date when he should have had the goods shipped, the vendor having paid the warehouse charges up to that date.

Warranties and Conditions.

Implied warranty of title on sale of specific goods. The question opened up by the comments on the leading case of *Morley v. Attenborough* can hardly be considered as perfectly well settled. As was said by Lord Campbell in *Sims v. Marryat*, "the exceptions have well-nigh eaten up "the rule" of law as laid down by Parke, B., in that case. In *Peuchen v. Imperial Bank*, 20 O. R. 333, so late as 1891, Boyd, C., said that with *Morley v. Attenborough* unreversed, he felt uncertain as to this head of the law. "The "general doctrine has been completely changed, according "to the exposition of individual judges within less than a "generation, so that, in 1867, we have Bovill, C.J., saying: " "I consider the general rule to be that upon a sale of " "goods there is no warranty of title implied by law," and "in 1884, Stephen, J., is of opinion that the law usually presumes a warranty of title on sale of chattels, and particularly in the case of executory sales of personal property." As to executory agreements, it was laid down in the early editions of Benjamin on Sales that the seller warrants by implication his title in the goods which he promises to sell; because plainly nothing could be more untenable than the pretension that if A promised to sell 100 quarters of wheat to B, the contract would be fulfilled by the transfer not of the property in the wheat, but of the possession of another man's wheat. It was with respect to a sale of specific chattels that the question remained open, and as to these it was universally conceded that an affirmation by the seller

that the chattel was his was equivalent to a warranty of title, and that this affirmation might be implied from his conduct as well as from his words, and might also result from the nature and circumstances of the sale. The controverted question was therefore narrowed down to the point whether, in the sale of a chattel, an innocent seller, by the mere act of sale asserted that he was the owner, because if so, it followed from what has already been said that he warranted the title. In the Ontario case referred to of *Peuchen v. Imperial Bank*, Boyd, C., quoted as the last significant word on the subject the statement of the law given by Judge Chalmers, now Sir M. D. Chalmers, in his book on the Sale of Goods, which had come to hand since the argument of the case. In that work the author quoted the general rule as laid down by Benjamin, thus: "By a contract of sale the seller impliedly warrants his right to sell the goods, unless the circumstances of the sale or agreement to sell are such as to show that the seller is transferring only such property as he may have in the goods." In the case referred to, which was before the Ontario Chancery Division, the Imperial Bank had endorsed a bill of lading, held by them, over to the plaintiff for a quantity of oil, and the goods having been seized and forfeited under the Customs Act, the plaintiff could not get possession. The jury found that it was the bank which sold the goods to the plaintiff; that they professed to sell with a good title; that they had not a good title, and the plaintiff could not by any diligence have obtained the goods. It was held that this was not merely a transfer of the bill of lading by the bank as a redeemable instrument, but as one which had become absolute by the exercise of the bank's power in default of the original holder of the bill of lading, and that it was not a mere transfer of the bank's interest to the purchaser, but a sale of the goods, with a warranty of title. Robertson, J., stated his conclusions on the general question of warranty of title, as follows: "The conclusion I have come to, after considering these and other cases, is that the law at the present day is that in all ordinary sales of goods, the vendor, by exercising the highest act of dominion over the article in offering it for sale, thereby leads the purchaser to believe that he is

“ the owner; but this applies, it appears to me, only to
“ ordinary cases, and not to a case where the vendor is
“ acting in any special character, such as a mortgagee, a
“ pledgee, or a sale by the sheriff under execution, etc.,
“ where the vendor does not, by word, act or deed, give the
“ purchaser to understand that he is selling the goods, and
“ not his interest merely or his title thereto. It may be
“ that I have put the rule too broadly in the foregoing,
“ and that the weight of authority is against it exactly in
“ the terms put; but I think it beyond doubt that it cannot
“ be extended beyond what I have stated.”

The American distinction is then dealt with, between the case of goods in the possession of the vendor and those not in possession. But this distinction is here said by Robinson, J., to have been decisively repudiated by Buller, J., in *Pasley v. Freeman*, 3 T. R. at p. 58, and by the judges in *Eichholz v. Bannister*, 17 C. B. N. S., 708. But even according to the American distinction, he thought the excepted cases, in which there would be no warranty of title, must be substantially cases of sales of the mere naked interests of persons having no possession, in which cases no warranty of title was implied, and he cited, along with another case, the Massachusetts case of *Shattuck v. Green*, in which Morton, J., said: “ The possession of an agent or of a
“ tenant in common holding the goods for the vendor, and
“ as his property, and not adversely, is the constructive
“ possession of the vendor; and if he sells goods thus held
“ as his, a warranty of title is implied.” 104 Mass. 42.

In *Dickie v. Dunn*, 1 Terr. L. R. 83, defendant sold a mare, then, as was assumed in the absence of evidence to the contrary, in the defendant's possession. It was held that the sale being one of a specific article, and there being no evidence that the vendor did not intend to assert ownership, but only to transfer such interest as he might have, there was an implied warranty of title. The defendant having arranged with the plaintiff that a third party should hold the mare pending settlement of the dispute about the title, and having, upon inspecting the adverse claim and alleged title, authorized the custodian to give her up to the claimant, held sufficient evidence by way of admission on

which the trial judge could reasonably find breach of warranty.

Implied warranty of merchantableness. Remedy for breach in case of specific chattel and goods in general, respectively. The case of *Mooers v. Gooderham & Worts*, 14 O. R. 451 (1887), contains a clear statement by Ferguson, J., of the rights of the vendee on a sale of goods which turn out to be unmerchantable. The sale was of a cargo of rye, which on being unloaded, was discovered to be, part of it, heated. There had been no opportunity to inspect as in the case of *Borthwick v. Young*, 12 A. R. 671, where it was held that plaintiff could not recover damages on a sale of apples which he had had an opportunity to inspect, and of which he had inspected several barrels, but which, although marketable, turned out to be of inferior quality to that expected by the purchaser and inferior on the whole to those seen on the inspection. The rights and duties of the parties in case of goods discovered to be unmarketable are set out by Ferguson, J., at p. 457 of the report.

Right of purchaser to set up in action for the price the worthlessness of the goods, after recovery of damages in previous action for breach of warranty. The case of *Abell v. Church*, 1 S. C. R. 442, in the Supreme Court of Canada, on appeal from the Ontario Court of Appeals, raised, apparently for the first time in any court of the Empire, the question whether a purchaser who had brought an action for breach of warranty, and recovered special damages for the stoppage of his mill and the expense of removing the wheel and fitting up another wheel, could, in a subsequent action by the vendor for the price, give evidence of the worthlessness of the wheel, the contention being that this must have constituted an element of the damages recoverable in the purchaser's action for breach of the warranty, and was therefore *res judicata*. The trial judge had excluded the evidence, saying, "it was optional with the defendant" (the purchaser) "to set up the defective quality as a defence, or in a cross-action, to go for both that and for special or consequential damages," but, as he had already brought an action, in which the damages now sought by way of abatement might have been, and perhaps had been, recovered, the evidence

should be excluded in this action. The Supreme Court of Canada, reversing the judgment of the Ontario Court of Appeals, held that this evidence had been improperly excluded, and that the purchaser, when sued for the price, could show that the wheel was valueless. In the dissenting opinion of Sir Henry Strong, then Strong J., the question is treated as a new one, not hitherto decided by any English case, and he states it to be whether the vendee of chattels purchased with a warranty, for cash, who had not paid the price, could, in an action formerly brought by him for breach of the warranty, have received general, as distinguished from special and consequential, damages. If, in the former action, the purchaser could have recovered his general damages, consisting of the difference between the actual value of the article sold and what would have been its value if it had been equal to the warranty, then it was not, he thought, to be disputed that the former judgment estopped the purchaser from insisting in the present action on compensation or reduction of the price, on the ground of breach of warranty. The warranty being a collateral contract, the remedy of the vendee for a breach of it was originally restricted to an action, the right to bring which was in no way dependent on the payment of the price. The case of *Basten v. Butter*, 7 East, 479, had sanctioned the practice of allowing the purchaser, in an action for the price, to set up the breach of warranty in mitigation of damages, and obtain a reduction corresponding with what are called the ordinary or immediate damages arising from non-compliance with the warranty, namely, the difference between the actual value of the goods sold and that which would have been their value if they had answered the warranty. But the cause of action being one and indivisible, although the damages were to a certain extent, for practical convenience, made divisible, no second action could be brought on the warranty on the pretence that the recovery in the first action was confined to special damages; and for the same reason no recoupment could be had under like conditions, unless the non-payment of the overdue price disentitled the vendee to recover his general damages in the first action, which was the very point in the present appeal. "This is all the cases prove.

“ It is now, as I understand the judgment of the majority
“ of the court, intended to add to these propositions
“ another, namely, that a purchaser is not to be permitted
“ in an action on a warranty to recover his ordinary gen-
“ eral damages, consisting of the difference between the
“ actual and the warranted value, so long as he has not
“ fulfilled his own liability under the contract by payment
“ of the price.”

The reasoning by which a majority of the court arrived at a conclusion opposed to the opinion of the dissenting judge, is contained in the passages quoted by the Chief Justice, Sir William Buell Richards, from the opinion of Moss, J., who dissented from the judgment of the Court of Appeal. Referring to the contention that the purchaser in the suit on the breach of warranty, claiming special damages, would be estopped by the judgment from setting up the worthlessness of the article when sued for the price, the learned judge proceeded as follows:

“ That rule would constrain him to recover for this sum,
“ and as a consequence would drive Abell into commencing
“ an action against him for precisely the same sum, even
“ if the parties really agreed in the position that the ma-
“ chinery was of no value, and neither desired any litiga-
“ tion upon that point. Church could not omit to claim this
“ sum, because he would then be exposed to a suit, in which
“ he would be compelled, according to that rule, to pay the
“ full contract price for the worthless article. Abell must
“ then, to protect himself, commence an action for the
“ whole price, although, if no such claim had been made, he
“ might have been content to resume possession of the
“ machine and make no demand for the contract price. In
“ my judgment no arguments founded upon mere techni-
“ cality should suffice for the establishment of a rule lead-
“ ing to consequences so inconvenient and unjust. I
“ cannot perceive that it involved any violation of the rule
“ against splitting up a cause of action, to permit Church
“ to say in his action that he only claimed for the special
“ damages, and that it was time enough to discuss the
“ question of inferiority, or worthlessness if Abell prose-
“ cuted him. Why should Church have been then compelled

“ to advance any claim in respect of a matter which he
“ was content to let rest?

“ It seems to me that in harmony with the decisions of
“ *Mondell v. Steele* and *Davis v. Hedges*, it is a reasonable
“ rule to lay down for the ascertainment of damages where
“ a purchaser with a warranty brings an action before he
“ has paid the contract price, or at least rendered himself
“ absolutely liable to pay it, as by giving a bill of exchange
“ or a promissory note, that he shall only recover the
“ amount of his special damage, and that he shall be left
“ to use the inferiority of value as a weapon of defence, if
“ the vendor claims from him the full contract price.

“ It was merely pressed in argument that his liability
“ to pay the full contract price entitled him to recover to
“ the same extent as if he had actually paid, but if the
“ correct rule be that I have just stated, the patent objec-
“ tion to this argument is that it assumes a degree of
“ liability which did not exist. He was only *liable* to pay
“ what the appellant could by law compel him to pay. This,
“ according to *Mondell v. Steele*, was not the contract
“ of value. For the amount equivalent to representing an
“ price, but the difference between it and the inferiority
“ inferiority of value he was not liable.

“ Before any action was brought by either party, the
“ ultimate right of the appellant was to receive from the
“ respondent the contract price diminished by the inferi-
“ ority of value. The ultimate right of the respondent was
“ to receive from the appellant compensation for his special
“ damage. As it is, the respondent, while only recovering
“ his special damage, is condemned to pay the full contract
“ price for no better reason, so far as I can perceive, than
“ that he brought his action first.”

The reasoning of Moss, J., in the Court of Appeal, suggests important questions. He argues that because a defendant, sued for the price, could reduce the plaintiff's recovery by proving the worthlessness of the article, and yet sue for consequential damages, the purchaser suing for breach of the warranty, must be allowed after recovery to show the defect in the article in mitigation of damages when sued for the price. The reason why the purchaser in the case just stated is allowed to sue for consequential damages

is that he could not have set these up in answer to the action for the price, and the claim, therefore, is not *res judicata*. If the purchaser suing for damages on the warranty could have recovered the general damages, it is difficult to see the answer to Strong, J.,'s contention that the matter is *res judicata* after the judgment in the action on the warranty. The question seems, therefore, to be reduced to the inquiry could the purchaser recover these damages where he has not paid for the goods or given a note, and the answer of Mr. Mayne is that he could do so because he is liable for the price. The convenient course would seem to be to allow the general as well as the special damages to be claimed in the purchaser's action on the warranty, even though the price has not been paid, the vendor being allowed to set off the price, thus disposing of all the matter in controversy without circuity of action.

Action for breach of warranty though price not paid. *Cook v. Thomas*, 6 Man. 286, was an action on a warranty of second-hand machinery, good for twelve months, with proper care. It was held that damages could be recovered for the breach of the warranty, notwithstanding that the purchase price had not been paid, promissory notes having been given for the amount. *Church v. Abell* was distinguished. "Before the present action was brought the purchase money had been secured, and a large part of it paid, so the case falls within the exceptions referred to by Moss, J., in his dissenting judgment in the Ontario Court of Appeal. In the Supreme Court his judgment was approved of. Indeed, Mr. Justice Strong held that a purchaser's rights in respect of a warranty were in no way subject to any condition of prior payment. The measure of damages was held to be the sum which at the time of the sale it would have been necessary to expend in order to remove any defect which constituted a breach of warranty."

May be warranty without property passing. Warranty on bailment. Damages. In *Copeland v. Milligan*, 9 Man. 143, the plaintiff sued on a promissory note given to him on the sale of a horse. A condition of the agreement was that the property was not to pass to the defendant until payment. Defendant filed a counter-claim for an alleged

breach of warranty that the horse was sound. The horse was delivered to the defendant and used by him for some time, but died before the maturity of the note, from a cause not connected with the unsoundness complained of. At the trial the jury found that there was a warranty, that the horse was unsound, and that the difference in the value between the horse as it was when delivered and what it would have been if sound was \$90.00, for which amount the verdict was entered on the counter-claim. It was held, first, that the consideration of the note was in part the bailment and in part the promise of the vendor to sell; secondly, that an action lay for the breach of the warranty, and that the purchaser should recover as general damages for the period of the bailment and for the proposed sale together, the same amount as if there were an immediate sale; thirdly, that the right of action for the breach of the warranty arose at once, just as in the case of an absolute sale of a specific chattel. Killam, J., said: "For the plaintiff it was "contended that there should be no right of action for "breach of a warranty as the property had not passed to "the defendant, and that therefore such a counter-claim "could not be set up. . . This involves a question that "has never yet been settled in this Province, although it "has occasionally been raised. In view of the frequency "with which such contracts are entered into, it is a ques- "tion of considerable importance. In Ontario it was held, "in *Frye v. Milligan*, 10 O. R. 509, and *Tomlinson v. Morris*, 12 O. R. 311, under contracts differing in some "respects from the contract now in question, that the "purchaser could not maintain an action for general dam- "ages for breach of warranty until the property passed to "him. But it was suggested that he might be entitled to "special damages. . . It seems to me that it was "open to the jury to infer that the whole consideration "for the note was not an agreement for the sale of a horse "to the defendant *in futuro*, but that the agreement was "one also for the bailment of the horse to the defendant "at the risk of the latter until maturity of the note, and "then for the sale, if the animal should still be in existence. "In this view, part of the consideration for the note would "be the bailment, and a total failure of consideration could

“ not be alleged. If such an inference would be open and
“ would support the verdict we must suppose it to have
“ been made.. Now it is clear that upon a bailment for hire
“ there may be an implied warranty. For this proposition
“ a number of cases are here cited. Certainly there may
“ be an express warranty. . . . The unsoundness was
“ such, according to the evidence of the defendant, as to
“ impair the usefulness of the horse from the time of the
“ delivery to him. There was then an immediate damage
“ to the defendant. Whether upon the sale or upon the
“ bailment, these are not to be deemed to be new breaches
“ of warranty and new rights of action as long as damage
“ results to the purchaser. . . It appears to me that
“ the reasonable view of such a contract is that the right
“ of action arises at once, just as in the case of an absolute
“ sale of a specific article, and that the purchaser should
“ recover as general damages for the period of the bail-
“ ment and for the proposed sale together the same amount
“ as if there were an immediate sale.”

Description of Goods. The vendor made a sale of oats, described as “ good Canada oats,” and in fulfilment of the agreement delivered a mixture of oats and burnt wheat, the latter being not far short of one-quarter in quantity of the former.

“ If a portion had been oats of an inferior quality, or
“ some other grain, or imperfectly formed grain, such as
“ may grow with and is commonly mixed in its growth or
“ culture with oats, then it might be said that plaintiff
“ could not complain if this sort of imperfect grain made
“ the oats less marketable, or reduced its value, because he
“ did not protect himself by a stipulation that he was to
“ have good, marketable oats. But when the admixture is
“ of a kind of grain generally much more valuable and
“ which, having been injured by fire, has apparently become
“ much less valuable than oats, and is designedly mixed
“ with the oats to dispose of it to better advantage, it
“ would seem unreasonable to hold that any purchaser
“ would be considered, under the name of oats, as pur-
“ chasing such a mixture, or that it could properly be sold
“ in the market under the name of oats. I do not, for the
“ purpose of deciding this case, assume that the defendant,

“ when he made the bargain with plaintiff, was himself
“ aware of the admixture which lessened the value of the
“ article sold, but put the case simply on the ground that
“ he did not deliver to the plaintiff the article which the
“ latter bought, or at all events the quantity of the article
“ he agreed to sell.” *Twohy v. Armstrong*, 18 U. C. C.
P. 273.

Verbal warranty enforceable. In the case of *Northwood v. Rennie*, 3 O. A. R. 37, the defendant was sued for a breach of warranty of a hay-press, which was warranted to be capable of pressing ten bales of hay *per diem*. The jury found that there had been such a warranty given, but the defendant contended that there had been no absolute sale, but one on a condition which failed, i.e., that the agreement was that the plaintiff should purchase the machine if it proved capable of doing the work stipulated. The question of sale or no sale was practically withdrawn from the jury, but the court on the evidence considered that the jury would have been obliged to find that there had been a sale with the warranty found by the jury. Objection having been taken that the warranty was of no force, because there was no compliance with the Statute of Frauds, the court, per Osler, J., said: “ We agree with the court below in the
“ opinion that the plaintiff’s right of action is not affected
“ by the statute. For all the purposes of the present con-
“ troversy, the defendant’s liability must be held to be the
“ same as if he had made a verbal warranty upon a sale of
“ a machine to be manufactured, and the machine when
“ delivered had not been of the proper description. It
“ cannot be contended that such a promise need be evi-
“ denced by writing.”

Goods sold by description. Right to reject. Plaintiffs were manufacturers of billiard tables in Toronto, and contracted for an exchange of tables with the defendants. Defendant represented his billiard table as a full-sized English billiard table, etc., adding, “ I am told that it cost £200
“ in England, and is very little worse for the wear.” It was held by the Supreme Court of Canada, reversing the decision of the Supreme Court of Nova Scotia, that the plaintiffs were justified in rejecting the table sent, which, instead of being a full-sized English billiard-table, was an

old, out-of-date American table. Sir William Ritchie said: "It is clear that the principle on which the case must be determined is not necessarily that it is a question of warranty or representation, but merely whether or not the article delivered to the plaintiffs fairly answered the description of what the defendants agreed to sell. He held that it did not, and that the defendant must pay the plaintiff the full value of the table received by them. *May v. McDougall et al.*, Cameron's Supreme Court Cases, 449, said there to be incorrectly reported in 18 S. C. R. 700."

Express warranty does not exclude implied warranty to correspond with description. Under sub-section (d) of Section 16 of the Sale of Goods Act, R. S. Man. (1902), Ch. 152, an express warranty on the sale of goods by description does not exclude the implied warranty provided for by Section 16 of the Act, that the goods shall correspond with the description, and on the sale of a threshing engine by description, there is an implied warranty that it shall be reasonably fit for the work that the vendor knew the buyer wanted it for, which is not inconsistent with any of the express warranties usually inserted in such a contract. Where a contract for the sale of a threshing engine contains the usual warranties, and also a provision that in case the engine is not satisfactory the Company may supply another engine, and if it does, the terms of the warranty shall be held to be fulfilled and the company shall be subject to no further liability, this should not be considered to mean that the Company would be exonerated after supplying another engine, no matter whether it was as defective as the first one or not. Interest was allowed as damages because the purchaser was paying interest on a note. *Northwest Thresher Company v. Darrell*, 15 Man. 553. This was the decision of a single judge.

Sale of glandered horse. The Diseased Animals Act, 54 Vict., Ch. 17, Sec. 16, R. S., Man., Ch. 5, Sec. 25, provides that any person who sells or disposes of any animal infected with or laboring under any infectious or contagious disease, or any animal respecting which there is cause of suspicion that such animal is infected, shall for every such offence incur a penalty of a hundred dollars. Defendant

sold a horse suffering from glanders, but the trial judge found that he had no cause for suspicion that the animal was infected, and there was no warranty. In an action for damages it was held that the defendant was not liable. Even if there had been a breach of the statutory duty, the rule of *caveat emptor* would apply. *Rothwell v. Milner*, 8 Man. 472.

Delivery of goods not answering description. Damage resulting from use. A case resembling some of those mentioned in the text came before the Court of Queen's Bench in Toronto. The purchaser had ordered a quantity of "stone spar, such as potters use." The order was entered in the book as stone, then changed to flint, and then shipped. The railway company's notice called it "fluid." The purchasers assumed that it was the kind of thing they had ordered, and used it in their business, destroying thereby two kilns of their pottery. The judge charged that the defendants were liable if the order sent by the purchasers should have been understood by the defendants as an order for Cornwall stone, and if the plaintiffs were justified in believing that the article sent was, and did not know that it was not, such stone, but that if the defendants were justified in sending ground flint on the order received they would not be liable. This was held a proper direction. *Baker v. Lyman*, 38 U. C. Q. B. 498 (1876).

Goods inferior to description, evidence of acceptance and contract for quantum meruit. The defendant contracted for a carload of "No. 1 green hoops," to be delivered at the railway station. When the hoops arrived they were removed to defendant's place, and some were used by him, merely, as he stated, for the purpose of testing them. He wrote to the plaintiffs, expressing his astonishment at their sending him dry and rotten hoops for first-class green hoops, and complained also that the number was less than that contracted for. He enclosed a bill, in which the correct number was stated, as he contended, with the amount which he intended to pay, "and not a cent more, because "they were not worth that." If the plaintiff would accept this amount, he was to let the defendant know, and he would remit. In answer, the plaintiff threatened a suit, when the defendant replied that if plaintiff would not accept the

amount he might go on and sue. It was contended for the defendant that the hoops had been rejected, and that there was no evidence to go to the jury of an acceptance and an agreement to pay a *quantum meruit*, as plaintiff contended. It was held that there was evidence of acceptance, and that plaintiff was entitled to recover the value of the goods. "There was the fact that the defendant had used some of the poles, and those letters to go to the jury, from which to find whether or not the defendant had determined to keep the poles, and only to pay for them what they were worth, as he had a right to do, or had refused to receive them. The poles were, by the contract, to be delivered at the railway station, and although the removal from the station to the plaintiff's own place would not necessarily constitute an acceptance of them, still it could not be withdrawn from the jury as a circumstance to be considered in arriving at a decision." *McClure v. Kreutziger*, 6 O. R. 480.

In *Leggatt v. Cleary*, 13 O. R. 105, the contract was for boots, which the defendant claimed were not in accordance with the contract; but he had sold a number of them, and had unduly delayed claiming to be entitled to return the goods. Moreover, he had given acceptances for the whole purchase, and had paid one of the acceptances. It was held that the finding in favor of the plaintiff on the facts was correct, as there was unquestionably good consideration therefor, and defendant's remedy, if any, must be in a counter-action for damages.

In *Bertram v. Massey Manufacturing Company*, 15 O. R. 516, the sale was of iron of a particular brand, which the defendants tested and found to be inferior to the quality stipulated; but they used more than was necessary for the purpose of testing, and were held liable to pay for the whole quantity that had come into their possession, but at a reduced price.

Condition in sale of staves "to be subject to the culling of S." In a case in which logs were sold under a contract containing such a condition, it was held that the culling by the person named was conclusive between the parties, and that the purchaser could not claim as to the logs so culled that they were unmerchantable. "I take it

“ to be clear that before plaintiff could recover under this contract, it would be necessary for him to aver and prove the fulfilment of the condition, namely, the culling of the staves by Sommers. . . . The obligations of the plaintiff and defendant are mutual.” Per Gwynne. J. It was therefore held that the defendant could not object to pay for the staves that had been so culled by Sommers. *De Cew v. Clark*, 19 U. C. C. P., 155.

Condition as to inspector to be agreed upon complied with by agreement during inspection. In a contract for the sale of lumber, a clause was inserted, “ the inspection of this lumber to be made after the same is landed here (Windsor) by a competent inspector, to be agreed upon between buyer and seller, and his inspection to be final.” The majority of the Ontario Court of Appeal seem to have held that the inspector should have been agreed to before he began to inspect, and they set aside a verdict for the plaintiff on this ground. But the Supreme Court held, in accordance with the dissenting opinion of McLennan, J., in the Court of Appeal, that it was sufficient that the inspector appointed by the plaintiff had been agreed to by the defendant while the lumber was being landed or at any time before the inspection was completed. *Thompson v. Matheson*, 30 S. C. R. 357 (1900).

Purchaser's remedy on a warranty of quality, etc., with condition to return article if defective. In *Hamilton v. Northey Manufacturing Company*, 31 O. R. 468, the sale was of a gasoline engine, fully described in the memorandum of sale, which contained a stipulation that if the engine was found defective on being tried, the purchaser should notify the seller, who should be allowed an opportunity to remedy the defects; or if this could not be done, to supply another engine. The purchaser, instead of returning the article, sought damages for the defects. This, it was held, he could not do. His remedy, under the contract, was to notify the vendors, and in the event provided for by the contract, return the engine and demand another.

Duty to give prompt notice of non-correspondence with sample does not apply strictly to contract to grind wheat into flour. The duty of a purchaser of goods sold by sample to give prompt notice to the vendor of a claim that

the goods are inferior to sample is referred to in *Stephenson v. Ramsey*, 2 U. C. C. P. 196 (1852), where Macaulay, C.J., notices an apparent inconsistency in the cases, some holding that where the purchaser, upon a sale by sample, has had an opportunity to inspect the article delivered, and has unequivocally accepted it and converted it to his own use, not only does the property pass, but he is liable to be precluded by his conduct from afterwards disputing the correspondence of the goods with the sample; while, in other cases of sale by sample, it has been held that the vendee may accept and retain the goods, and either bring an action for the breach of the implied warranty that the goods are equal to the sample, or resist an action for the price by proving the deficiency in mitigation of damages. "But in such case it seems to be expected (if not decided) "that he must give prompt notice of the deficiency, not "upon the ground that the vendor may elect to take back "the goods and rescind the bargain, or that the vendee's "notice impliedly offers to return and rescind on his "part, for it might be very inconvenient and even impossible for him to do so; but rather at the peril of being "held concluded in evidence from setting up such a case "after unreasonably delaying notice, and as it were, "evinced, by his silence, a tacit acquiescence in the fulfillment of the contract by the vendor." The case in point was that of a contract by the defendant, if the plaintiff would deliver to him a specified quantity of wheat according to sample produced, to grind it into flour and return a stipulated quantity of flour of a specified quality for the wheat so delivered. The defendant disputed the quality of the wheat delivered, and Macaulay, J., said that in such a case the rules prevailing between vendor and vendee upon sales by sample did not apply with equal force, for here the property was not to become the defendant's, but it was to remain the plaintiff's, and the defendant was only to do something upon it for him. No other member of the court suggested any such distinction, and although the distinction is given in the headnote as part of the judgment of the court, it is safer to consider it as a dictum of Macaulay, C.J.

CHAPTER III.

ENGLISH AND CIVIL LAW CONTRASTED AS TO THE NECESSITY FOR DELIVERY IN TRANSFERRING THE PROPERTY IN GOODS SOLD.

As has been already observed, the rules which mark the difference between an executory agreement and a sale, are nearly the same as those which, under the Civil law, distinguished between a mere contract to sell, and a perfect sale or "*emptio perfecta*."

So far as those rules are founded in the nature of things, this is what might be expected ; but some of the rules, which are merely technical, have been partially, and as it seems inconsistently, introduced into English law. The Civil law is founded, amongst others, upon two assumed principles, which are not recognised by the English law ; one is, that a sale must be for a fixed price in money, and that a contract to part with property for a valuable recompense, not consisting of moneys numbered, cannot be a sale, but must be of a different nature. The other is, that property cannot be transferred by any agreement, unless there be an overt act of delivery of possession. Neither of these principles is recognised by the English law, and such of the rules of the Civil law as are founded exclusively upon them, ought not to prevail in a system in which the principles themselves do not exist. It seems, however, that this has not been always kept in sight by the English Judges. The Civil law consistently declared, that there could not be a perfect sale until the price was fixed in money, though everything else was ascertained ; and, consequently, that a contract to sell the whole of a particular parcel of goods, at a price depending upon the number, weight, or measure of those goods, could not be a sale until the goods were numbered, weighed, or measured, for till then the price was not fixed in money.

The contract on the part of the seller was complete, for he was to transfer a specific ascertained thing, in the state in which it then existed, but the consideration was not a fixed sum in money, till the number, weight, or measure was ascertained. This was a defect in the sale, according to the principles of the Civil law, but it is hard to see why it should prevent the contract amounting to a sale in English law. In many cases the weighing, &c., may be necessary to ascertain the specific goods; in others it may be necessary in order to put the goods into a deliverable state, and in those cases, the reasons are as applicable to English as to Civil law; but where, as in *Zagury v. Furnell* (a), and *Simmons v. Swift* (b), there is nothing unascertained except the money value of the price, and yet the goods are held not to be sold, there seems little to be said, except that such were the decisions. With this exception, however, the Civil law seems to differ from the English, where the difference in the fundamental principles becomes material, and to agree with it in other respects.

English Law.—Operation of Contract.

In the English law a contract of sale has two effects (c). It operates as a contract giving rise to obligations or rights *in personam*, as, for example, an obligation binding the seller to deliver on payment of the price, and binding the buyer to pay the price; and it also, in some cases, operates as a conveyance of the property from the seller to the buyer, giving to the buyer all those real rights or rights *in rem* which follow the property.

It operates as a conveyance the moment the contract is made if the thing is specific, unless some rule of law as to weighing or measuring or otherwise prevents the passing of

(a) *Zagury v. Furnell*, 2 Camp. 240, *ante*, p. 189.

(b) *Simmons v. Swift*, 5 B. & C. 857, *ante*, p. 189.

(c) Austin's Jurisprudence, 3rd ed., 1000 and 1006, Table II., note 4, C. c.

the property, or unless the parties have agreed that it shall not pass (a).

But if the thing is not specific, or is specific and some rule of law, as for example as to weighing, measuring, or putting into a deliverable state, or the intention of the parties, prevents the property passing, then the contract, at the time of making, merely operates to create personal obligations and no *jus in rem* is created; and until the thing is made specific, or the rule is complied with, or the intention exists, the owner may, in defiance of his contract, sell to some third person and give him a perfectly good title even if that third person had notice of the prior contract. When the thing has been made specific, or the rule of law has been complied with, and the intention existed, thenceforward the case is the same as if these circumstances had existed at the date of the contract, and it operates as a conveyance.

In other words, a contract by which it is presently agreed that when an event shall happen in future then the property shall pass, operates as follows: up to the happening of the event personal obligations only are created; after the event happens the contract operates as a conveyance, the property passes, and real rights are created.

But by the Roman law a contract of sale was only an enforceable promise. It gave rise to obligations only, and did not operate as a conveyance of the property. With them the property could be transferred by delivery only. The Roman contract purported to pass the whole of the seller's interest to the buyer, but it did not pass the property, for that passed by delivery only, and even delivery did not pass it if the seller was not actually the owner. The contract merely gave rights *in personam* but no rights *in rem*. Pothier (a) says the contract of sale of the Roman law comprises "An obligation to deliver the thing to the buyer, "and also an obligation, when it has been delivered, to defend "him against all claims, which may deprive him of his "possession, or prevent him from making use of the thing

(a) Pothier's Contract of Sale, translated by Cushing, p. 1.

“as his own; but they do not, in strictness, import an obligation to transfer the property. . . . And, therefore, if a buyer discovers that the seller was not the owner of the thing sold, and consequently that the property in it had not been transferred to him, he cannot, on that account, so long as his possession remains undisturbed, complain that the seller has not fulfilled his obligation. It is, indeed, of the essence of the contract of sale, that the seller should not intend to retain the right of property in the thing, when he is the owner of it; and that in such case, he should be bound to transfer it to the buyer. . . . But when the seller is not the owner, if he in good faith believes himself to be so, he is bound only, as above stated, to defend the buyer against those who seek to deprive him of his possession, or to prevent him from exercising the rights of ownership.”

The expression, “*Res perit domino*” is a very meaningless one in the law of sales; and the distinction must be borne in mind between being the loser of the property and the loser by the contract. Whether that expression can be used as an argument that, because the risk falls on one party, therefore the property is in that party, must depend entirely on the terms of the contract. For if the parties have agreed, as they certainly may, that although the property is to be in one party, yet if the goods are lost, the other party is to pay for them, it is clear that risk is no test of property in that case. Such was the case in *Castle v. Playford* (a). The case of *Anderson v. Morice* (b), in 1875, was a case of insurable interest, and it was argued at great length that the risk was with one party, even though the property was in the other.

The judgment of Lord Cottenham, L. C., in the case of

(a) *Castle v. Playford*, 41 L. J. Ex. 44; L. R. 7 Ex. 98. See also *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 322; 33 L. J. Q. B. 214; *ante*, p. 256; and *Shepherd v. Harrison*, 38 L. J. Q. B. 105 and 177; 40 L. J. Q. B. 148; L. R. 4 Q. B. 197 and 493; 5 E. & L. Ap. 116.

(b) *Anderson v. Morice*, 44 L. J. C. P. 10; 44 L. J. C. P. 341; 46 L. J. C. P. 11; L. R. 10 C. P. 58; L. R. 10 C. P. 609; 1 App. Ca. 713.

Dunlop v. Lambert (a), in 1839, is a very instructive one upon this point.

“ We have now to determine whether, in a question
“ between a carrier and the person to whom the carrier
“ is responsible in the event of the property being lost, the
“ sending an invoice to the consignee, by which it appeared
“ that the property had been insured and the freight paid by
“ the consignor, and the amount of such freight and insur-
“ ance charged by the consignor to the consignee, deprived
“ the consignor of the power of suing and of an interest or
“ right to recover the value of the property. It is no doubt
“ true as a general rule that the delivery by the consignor to
“ the carrier is a delivery to the consignee, and that the risk
“ is, after such delivery, the risk of the consignee. This is
“ so if, without designating the particular carrier, the con-
“ signee directs that the goods shall be sent by the ordinary
“ conveyance: the delivery to the ordinary carrier is then a
“ delivery to the consignee, and the consignee incurs all the
“ risk of the carriage. And it is still more strongly so if
“ the goods are sent by a carrier specially pointed out by the
“ consignee himself, for such carrier then becomes his special
“ agent. But though the authorities all establish the general
“ inference I have stated, yet that general inference is capable
“ of being varied by the circumstances of any special arrange-
“ ment between the parties, or of any particular mode of
“ dealing between them. If a particular contract be proved
“ between the consignor and the consignee, the circumstance
“ of the payment of the freight and insurance is not alone a
“ conclusive evidence of ownership; as where the party
“ undertaking to deliver at a particular place, the property,
“ till it reaches that place and is delivered according to the
“ terms of the contract, is at the risk of the consignor. And
“ again, though in general the following the directions of the
“ consignee, and delivering the goods to a particular carrier,
“ will relieve the consignor from the risk, he may make such
“ a special contract, that though delivering the goods to the

(a) *Dunlop v. Lambert*, 6 Cl. & Fin. 620.

“carrier specially intimated by the consignee, the risk may remain with him, and the consignor may, by a contract with the carrier, make the carrier liable to himself. In an infinite variety of circumstances the ordinary rule may turn out not to be that which regulates the liabilities of the parties.”

And it is no test in Roman law, for there the loss falls on the buyer, but the property is still in the seller.

In the Roman and Scotch law, “Risk is no test of property. The question of risk forms a point in the law of obligations, not in the law of transference; and the decision of it depends upon principles quite distinct from those concerned in the question of property” (a).

It may not be out of place here, while speaking of the effect of a contract of sale in English law, to point to a distinction which, although a fine one, seems nevertheless to be a clear one, between contracts which are intended to operate as sales at some future time, and contracts which are intended to operate merely as promises to sell. It is the difference which exists between an agreement that the property shall pass on the happening of some future event, without anything further to be done by either party in that behalf, and an agreement by which one party promises that on the happening of some event he will then transfer the property. In the latter case the property does not pass until he does sell the thing, although the event may have happened, and such a contract, at law, creates merely a personal obligation to pass the property, and that, at law, will not create any real right or *jus in rem*. In equity, however, the buyer is in a better position, and such a contract would, when the event had happened, give him a good equitable title to the goods against all persons excepting anyone who, in the meantime and *bonâ fide*, may have had the property transferred to him (b).

(a) Bell's Commentaries of the Law of Scotland, B. II., C. V. s. 1.

(b) Austin's Jurisprudence, 3rd ed., 1001, Table II., note 4, C. c.; and *Holroyd v. Marshall*, 33 L. J. Ch. 193, 10 H. L. R. 191; *Stockdale v. Dunalop*, in 1840, 6 M. & W. 232. See also *Tailby v. Official Receiver*, in 1888, 58 L. J. Q. B. 75; 13 App. Ca. 523.

For example, if the seller promises that on a certain event happening he will assign a particular horse, when that event happens he is bound to assign it, and in contemplation of equity, has assigned it, and if he die or become bankrupt before the assignment, equity will compel his legal personal representative to assign it (a).

This, among other things, was decided in *Holroyd v. Marshall* (b). There Taylor, the occupier of a mill, covenanted with his landlord that if he, Taylor, should bring any new machinery into the mill he would, at his landlord's request, assign such machinery to a trustee upon certain trusts. The sheriff, at the suit of a creditor who had obtained a judgment against Taylor, subsequently seized the added machinery before any assignment to the landlord had been made. The landlord claimed it as equitable assignee, and the House of Lords sustained his claim. The sheriff can only seize the debtor's interest, which in this case was nothing, the debtor having promised to assign to his landlord.

The following extracts from Pothier's celebrated Treatise *Du Contrat de Vente*, will be found to throw considerable light upon the subject-matter of the last chapter. The reader must remember that Pothier wrote of the law of France as modified by the customs of Orleans before the French Revolution, so that his positions are not always to be considered as universally true of the Civil law, and far less to be taken as authorities for English law.

The extracts are translated from the edition of Pothier's works, published by M. Dupin at Paris in 1835. The first extract commences at p. 139 of the second volume, and ends at p. 144; the second extract commences at p. 147, and ends at p. 150.

Pothier Du Contrat de Vente, Partie IV.

"It is a principle established in the title of the Digest *de peric. et comm. rei vend.*, that so soon as the sale is perfected,

(a) *Pest*, p. 324.

(b) *Holroyd v. Marshall*, 33 L. J. Ch. 193; 10 H. L. R. 191.

the thing sold becomes at the risk of the purchaser, though it has not been yet delivered, so that if during that time it chance to perish without the fault of the vendor, the vendor is freed from his obligation, and the purchaser is not on that account freed from his, and is not the less bound to pay the contract price.

“That the vendor should be freed from his obligation when the thing sold has perished without his fault, is a consequence of another principle, that every obligation *de certo corpore* is destroyed when the thing ceases to exist: *Traité des Obligations*, Part III., Chap. 6. This principle is founded in the nature of things, for the thing due being the subject of the obligation, it follows, that when the thing ceases to exist, the obligation can no longer exist, not being capable of existing without a subject.

“The second part of the decision, to wit, that the obligation of the purchaser does not cease to exist though that of the vendor be destroyed by the destruction of the thing, seems to be subject to more difficulty; nevertheless, it is true, and is founded in the nature of the contract of sale. This contract is of the number of those which are called consensual, which are perfected by the mere consent of the contracting parties. The delivery of the thing sold is not necessary for the perfection of the contract. The obligation to pay the price which the purchaser contracts, being then complete, by the mere agreement of the parties which has taken place, and independently of the delivery, it should survive, although the thing sold has ceased to exist, and can no longer be delivered. It is true that so long as the seller is in default by not delivering the thing, he cannot compel payment, because he cannot be permitted to demand that the purchaser should fulfil his obligation towards him, whilst on his own side he has made default in fulfilling his own. But when the obligation of the vendor is extinguished, in one of the ways in which obligations from their nature may be extinguished, the purchaser has nothing to oppose to protect himself from fulfilling on his part his obligation, which having once been bindingly contracted, cannot be put an

end to, save in one of those ways in which obligations are terminated.

“Many moderns who have treated of the law of nature, amongst whom are Puffendorf, Barbeyrac, &c., have thought that the Roman lawyers had in this matter departed from the true principles of natural right ; and they maintain, on the contrary, that the thing sold is at the risk of the vendor so long as he remains the owner of it : that it is upon him that any loss befalling that thing should fall, though it was without his fault, unless the purchaser was in default by not receiving it, and in like manner that it is he who should profit from any increase in the thing sold. Their arguments are, first, that it is a maxim recognised by the Roman lawyers themselves, that things are at the risk of their owner, *res perit domino*. The answer to that objection is, that the maxim is applicable when distinguishing between the owner and those who have the custody or the use of the thing ; there the thing perishes to its owner rather than to those who have the custody or the use, who, by the destruction which has befallen the thing without their fault, are discharged from the obligation which they have undertaken to restore it. But when we are distinguishing between the owner of a thing who is debtor of that thing, and the creditor of it who has an action against the owner to make him deliver it, there the thing perishes to the creditor rather than to the owner, who, by the destruction of the thing, is discharged from his obligation to deliver it. In fact, each loses the right which he had either in the thing or to the thing when it perishes by accident. The seller who is owner of the thing loses his right of property such as he had it, that is a right which he could not have kept, and which he was bound to have transferred to the purchaser, and the purchaser, on his part, loses the right which he had with reference to that thing, that is to say, the right which he had to cause it to be delivered.

“They object, secondly, that the purchaser has not bound himself to pay the price, save upon condition that he should have the thing given to him. I deny the proposition : he binds himself to pay the price, not on condition that the

vendor should give him the thing, but rather on condition that the vendor should bind himself on his side to him, that he will cause the thing to be given to him. It is enough, therefore, that the vendor should have entered into a binding obligation to that effect, and not broken his obligation, in order that the obligation of the purchaser should have a consideration and subsist.

“Although the reasons for the opinion of the Roman lawyers seem to me to preponderate, nevertheless, it must be owned that the question is not free from difficulty, and it appears that even the Roman lawyers have not been unanimous on this question, for Africanus in the law, 33 *ff. locat. conducti*. says positively, that if the state seize on the heritage which I have sold you before I have delivered it to you, so that it is no longer in my power to deliver it to you, I shall not, in truth, be liable to you for damages or interest, but I shall be bound to restore you the price. This text has seemed so positive to Cujas, that in his treatise *ad African.* upon this law, he has gone so far as to maintain, that according to the Roman law the thing sold was not at the risk of the purchaser, contrary to the positive decision of the other texts, and the general opinion against which he himself has written, *ad l. 34, s. 5, alia caus. ff. de contrah. empt.* Different commentators have conceived different methods of reconciling these. The most plausible is that of Davezan, Professor of our University of Orleans, in his treatise *de Contrah.* He says, that in the instance given by Africanus, if the purchaser has a reimbursement of the price, it is because the laws which compel possessors to quit possession of their heritage for some public cause, have apparently this clause, ‘notwithstanding all sales which they may have previously made which shall remain void.’ The sale being in that case rescinded, the purchaser must be reimbursed the price, but when the thing perishes that does not rescind the sale. Even if we do not admit this method of reconciling the authorities, and if Africanus was really of a different opinion from ours, this opinion, which is imported into the Digest incidentally on another point, must yield to the positive decisions of the

other lawyers in the laws 7 & 8 *ff. de peric. et. comm. rei vend.*, and to the decision of the Emperors, to wit, of Alexander in the law 1, and of Gordian in the law 4, *cod. dict. tit.*, and lastly, of Justinian in his Institutes *de empt. vend.*, s. 3, who says positively, *Emptoris damnum est cui necesse est licet rem non fuerit nactus pretium solvere.*

“309. After having settled that the thing sold remains at the risk of the purchaser so soon as the contract of sale is perfect, we must discuss when does the contract so become perfect.

“In general, the contract of sale is considered to have become perfect so soon as the parties are agreed upon the price for which the thing is to be sold. This rule has its operation when the sale is of an ascertained thing, and is pure and simple. *Si id quod venierit appareat quid quale quantum sit et pretium et pure venit perfecta est emptio*, l. 8, *ff. de peric. et com. rei vend.*

“In the sale of those things which consist in *quantitate*, and which are sold by weight, number, or measure, as if one sells ten bushels of wheat out of that which is in such a granary, ten hundred weight of sugar, a hundred fish, &c., the sale is not perfect till the wheat has been measured, the sugar weighed, the fish counted, for up to that time *nondum apparet quid venierit*. It does not sufficiently appear what is the wheat, which the sugar, and which the fish, that are the object of the sale, since it can only be the wheat that shall have been measured, the sugar that shall have been weighed, and the fish that shall have been counted.

“It is true, that before the measuring, the weighing, the counting, and from the instant of the contract, the engagements which arise from it are in existence. The purchaser has thenceforward an action against the vendor to make him deliver the thing sold, as the vendor has an action for the payment of the price on offering to deliver it; but though the engagement of the vendor exists thenceforth, it is accurate to say, that it is not yet quite perfect, in this sense; that it has but an unascertained subject, and one

which cannot be ascertained but by the measure, weight, or counting.

“It is not, therefore, until one has made this measuring, weighing, or counting, that the thing sold can be at the risk of the purchaser, for risk can only attach on an ascertained subject.

“This decision applies not only where the sale is of a certain quantity of goods to be taken from a store in which there may be more, because in that case, as we have just said, until the measuring or the weighing has taken place, the thing which is sold consists not as yet of any ascertained subject on which the risk can attach: it also applies in the case where the sale is of all that there is in a store or a granary, if the sale has been made at so much for each hundred weight, for each bushel of wheat, &c.

“The sale in such case is not considered perfect, and the goods sold are not at the risk of the purchaser until they have been measured or weighed, for up to that time *non apparet quantum venierit*. The price being agreed on only at so much for each hundred weight which shall be weighed, each bushel which shall be measured, there is no ascertained price before the measuring or the weighing, and therefore the sale up to that time is not sufficiently perfect to make the risk of the things sold concern the purchaser: he ought not to be charged with it till the goods have been weighed or measured.

“But if the things have not been sold by weight or measure, but *per aversionem*, that is to say, in the mass for one entire price, in that case the sale is perfect from the moment of the contract, and from that time these things, like any others, are at the risk of the purchaser. All these principles are taken from the law 35, s. 5, *de contrah. empt.*

“310. The thing sold being at the risk of the purchaser from the moment of the contract, when it is sold *per aversionem*, and the thing sold on the contrary remaining at the risk of the vendor until the things are measured, when the sale is by measure, it is important to know when a sale is taken to be made *per aversionem*, and when it is taken to

be made by measure. The following rules will ascertain it:—

“*Rule 1.* It cannot be doubted that the sale is by measure, when it is expressly agreed that the price shall be for each measure, as if the contract be to sell so many bushels of wheat, which are in such a granary, at the rate of so much per bushel, or if the contract be to sell a bin of wheat in such a granary, which contains ten bushels, in each case the sale is made by measure; all the difference is, that in the first case, the surplus of the wheat, if there be more than ten bushels, is not sold, whereas in the second, the entire bin is sold, though there be in it more than ten bushels.

“*Rule 2.* When the sale is of so many measures of such a thing the sale is considered to be by measure, though by the terms of the contract there is expressed to be only one price, as if it were said, ‘Sold ten bushels of wheat for five hundred livres,’ the price being construed to be no more than the sum of the price for which each bushel is sold. *Non interest unum pretium omnium centum metrarum, an semel dictum sit an in singulos eos.* (dict. l. 35, s. 7, *de contrah. empt.*)

“*Rule 3.* When the sale is for one entire sum, not of so many measures of such a thing, but of some thing which is represented to contain so many measures, the sale is made *per aversionem* (as if the sale is expressed to be of such a meadow for 1,000 livres, warranted to contain twenty acres), and therefore the thing is from the moment of the contract at the risk of the purchaser, l. 10, s. 1, *de peric. et commod. rei vend.* The mention of the number of acres has no further effect than to bind the vendor to make compensation to the purchaser for any short-coming in the quantity, if it be smaller, as has been said (*supra*, part 2).

“311. There are certain things which are sold subject to being tasted, as wine, oil, &c. These sales are even less perfect on the part of the purchaser until the things sold have been tasted than are sales of things sold by measure until they have been measured, for in the latter, from the instant of the contract, it no longer depends upon the purchaser whether the sale shall take place. Before the goods have

been weighed or measured he is as much bound to execute the contract as the vendor is, and the weight and measure do but fix and ascertain what has been sold, whereas in sales made subject to tasting, the purchaser may refuse to execute the contract if he finds the merchandize not to his taste. *Alia causa est degustandi alia metiandi; Gustus enim ad hoc proficit ut improbare liceat, l. 34, s. 5, ff. de contrah. empt.* These sales, then, up to the time of tasting, are more imperfect than those made by weight and measure, and consequently in these sales the things sold cannot be at the risk of the purchaser until he has made default in tasting them.

“According to the practice of our tribunals, differing from the Roman law, it is requisite, in order that the purchaser may be considered in default, that the vendor should have obtained a decree to order the purchaser to taste by a fixed day, or otherways that the sale shall be absolute and unqualified.

“Note, also, that it is necessary to distinguish whether the purchaser has bargained that he is to taste the goods to see whether he approves of them, or only to see whether they are good, sound, merchantable, and not spoiled. It is only in the first case that he can be off his bargain by declaring, after he has tasted, that he does not like the goods. In the other he cannot reject the goods if they be really merchantable.

“312. When a sale is made subject to a condition, any loss sustained by a partial injury to the thing during the time intervening between the making of the contract and the fulfilment of the condition falls upon the purchaser if the condition is afterwards fulfilled, for the vendor is only bound to deliver it such as it may exist, provided it is not injured by his fault.

“But the total destruction of the thing falls upon the vendor, for the fulfilment of the condition, after the total destruction of the thing, cannot confirm a sale of a thing no longer existing.

“313. In sales in the alternative, whether the election be left to the vendor or expressly given to the purchaser, the first of the two things which perishes after the contract perishes

to the vendor, for that which survives remains *in obligatione*, he is bound to deliver it; but if the surviving thing also perishes, it perishes to the purchaser, who remains bound to pay the price, though there no longer remains any of the things sold capable of being delivered to him. See what is said of contracts in the alternative, in my *Traité des Obligations*, part 2, chap. 2, art. 6.

“If they perish in the interval the vendor is similarly freed from his obligation, and the purchaser remains a debtor for the price.”

Pothier Du Contrat de Vente, Partie V., Chap. 1, p. 147.

ARTICLE II.

Of the effect of delivery.

“319. When the vendor is owner of the thing sold, and has a capacity of alienation, or if he is not, when he has the consent of the owner, the effect of delivery is to transfer to the person of the purchaser the property of the thing sold, provided the purchaser has paid the price, or the vendor has given him credit for it.

“The contract of sale by itself cannot produce this effect. Contracts can only make personal engagements between the parties; it is only a delivery made in pursuance of the contract, which can transfer the property of the thing sold according to this rule. *Traditionibus et usucapionibus dominia rerum non nudis pactis transferuntur*, l. 20, *Cod. de pact.*

“320. Hence it follows that if the owner of a thing, after having sold it to a first purchaser without delivering it to him, has the dishonesty to sell and deliver it to a second, the property will be transferred to the second purchaser, *l. quoties* 15, *cod. de rei vend.* The first has no more than a personal action against the vendor for damages and interest arising from the non-fulfilment of the contract, and he cannot take

it from the second purchaser, who *bona fide* bought it, *in sciens prioris venditionis*.

“321. Hence, likewise, it follows that the creditors of the vendor may seize the things which their debtor has sold before he has delivered them, even though the purchaser has paid the price. The purchaser in such a case has no more than an action against his vendor, and has no *privilegium* upon the thing; but if once the delivery be made the property having passed to the purchaser, the creditors of the vendor can no longer seize that thing which no longer belongs to their debtor; creditors in hypothec alone can in such a case have an action of hypothec against the purchaser or other possessor if it be an immoveable. With regard to moveables there is no *sequela* by hypothec except in the case where a lodger or farmer has sold the furniture of the house or farm he rents, in which case custom permits the owner of the house or farm to follow the goods which are his security, but for such a *sequela* he has but the short time of a week, if it be a house, or a fortnight if it be a farm, to which the goods are attached.

“Creditors, even by chirograph, can also in one particular case follow the goods of their debtor, which have been delivered to a purchaser, to wit, when the debtor being insolvent has fraudulently sold them, and the purchaser has been a party to his fraud, being aware of the insolvency of the vendor, *tit. ff. quæ in fraud. creditor*.

“322. It is a disputed question amongst authors whether a conventional delivery made to the purchaser ought in this respect to have the same effect as an actual delivery would have had, and if it should be construed to transfer the property even with respect to third parties. Suppose, for example, that the thing has in truth remained with the vendor, and that the purchaser has had no actual possession, but that the contract of sale contains a clause by which it is said that the vendor has divested himself of the possession of the thing sold, and has given the purchaser seisin of it, declaring that thenceforward he would keep it in the name and on account of the purchaser; or suppose there be a

clause by which it is said that the vendor keeps the thing as tenant to the purchaser under a lease for a certain yearly rent. The question is, if in such a case the purchaser would have a good claim to replevy the thing, either as against creditors who had seized it in the hands of the vendor, or as against a second purchaser to whom the vendor had afterwards delivered it, and who had got into actual possession of it. Charondas, in his responses, decides in favour of the second purchaser, and he cites for his opinion two decrees: the one of 1498, the other of 1569. Belordeau, *liv. 1, chap. 18*, cites also for the same opinion two decrees of his parliament, that of Brittany.

“Their argument is, that as conventional deliveries have no overt act, but consist of a simple agreement made between the vendor and the first purchaser, they can have no such effect as to be considered to have transferred the property of the thing sold to the first purchaser, at least as against third persons, according to the rule, *Traditionibus et usucapionibus dominia rerum non nudis pactis transferuntur*, l. 20, *Cod. de pact.* As agreements can have no effect save between those who are parties to them, conventional deliveries which consist in no overt act, but only in the agreement of the parties, cannot be taken as against third parties to transfer the property.

“On the other hand, Gui Pape, *decis. 112*, maintains that a conventional delivery transfers the dominion and property of a thing as completely and specifically as an actual delivery, even as against third parties. By a conventional delivery which arises from a clause of bailment to his use, or by a clause of retention under lease, or even by a simple clause of constitution, the purchaser takes real possession of the thing sold to him, and by such taking of possession he acquires really the property; for we can acquire possession and property of a thing, not only by our own persons, but by the agency of another who takes possession in our name. *Animo nostro corpore etiam alieno possidemus*, l. 3, s. 12, *ff. de acquir. vel amit. poss.* *Generaliter quisquis omnino nostro nomine sit in possessione . . . nos possidere videmur*, l. 9, *ff.*

dict. tit. Then by these clauses the vendor takes possession in the name of the purchaser of the thing which he sells him. The purchaser, therefore, acquires possession by the agency of the vendor, just as he might have acquired it by the agency of any other who took possession in his name. This delivery, then, has the same effect as an actual delivery, and ought as much to transfer the property. It is useless to oppose to this, the law which says, *Non nudis conventionibus dominia rerum transferuntur*, and that agreements have no effect save between those who were parties to them, for that is true of pure agreements, but those which are accompanied by a conventional delivery are not simple bare agreements, and it is expressly decided in the law 77 *de rei vindic.* that such a conventional delivery arising from a retention of the thing by the grantor as lessee, put the grantee in possession, and transferred to him the property of the thing, and consequently a right to replevy it. From all these principles Gui Pape concludes, that a first purchaser to whom no more than a conventional delivery has been made of the thing sold, can replevy it against the second purchaser who has actually possession of it, and he bears witness that such is the constant practice of the Parliament of Dauphiny.

“I think this last opinion the better, subject to this limitation, that the proof of the delivery be established by a notarial document; or if it be under private signature, provided the priority to the actual delivery to the second purchaser, or the seizure made by the creditors be sufficiently established: *puta* by the death of one of the parties who have subscribed the document.”

From these extracts the reader may observe that a contract of sale without delivery amounted to a perfect sale, under nearly the same circumstances as in English law it amounts to a sale. But a sale in English law, as has been already said, transfers the legal property in goods: a perfect sale by the civil law had no effect upon the property, it was merely a personal contract binding the seller, but not the goods. So long as the seller continues solvent and retains the control of

the goods, there is no very substantial difference in the result of the two systems of law ; for by the civil law, as soon as the sale was perfect, the seller became bound to deliver the thing sold at the time prescribed by the contract, and till then to keep it subject to the same personal responsibility as if the thing belonged to the purchaser, and were committed to the seller as a bailee, *Domat, Civil Law, book 1, title 2, s. 2, 1, 2, 3, 24, 26* ; and according to Pothier, it was the better opinion that he might be compelled to deliver the thing in specie, though that was doubted ; and as, on the other hand, the buyer was subject to the same liabilities from the time the sale was perfect as if the property was his, and committed to the custody of the seller as his bailee, it seems that, as far as regards the substantial result, the property as between the seller and buyer passed on a perfect sale ; the differences being between them, rather formal than substantial, and rather affecting the form of remedy than the practical result.

When, however, the rights of third parties intervene, the difference becomes substantial. If, for instance, the seller dies before delivery, but after the sale, then, since the property is transferred by a sale, the buyer's right of property in the chattel is unaltered by the death ; but if the property were not affected, and the contract remained merely personal, the buyer's remedy would be good only to the extent to which the seller left assets. Or if the seller becomes a bankrupt, the assignees only adopt such of his contracts as are beneficial, whilst they take his whole property : therefore, if a buyer has acquired a property in the goods, he has that as a security, if not, his remedy is worthless. Or the seller may, as in the cases supposed by Pothier, have sold and delivered the goods to a second buyer, or they may have been seized by the seller's creditors, in each of which cases the vested property of the first buyer is by the English law allowed to prevail, unless under special circumstances.

The doctrine, therefore, that a sale transfers the property in the things sold, instead of merely conferring a personal right of action, is one of practical and substantial importance.

A gentleman of great learning, Mr. Serjeant Manning, has

questioned it in a note to *Bailey v. Culverwell* (a). He maintains that the rule that property is transferred by a sale without any delivery, is contrary to natural right, and is moreover a modern misapprehension arising from a mistaken construction of the civil law.

It does not seem evident in what the superior natural justice of the civil law consists. There is certainly nothing iniquitous in the rule of the civil law, *traditionibus dominia rerum non nudis pactis transferuntur*," but had the authors of the civil law written, *sine traditionibus dominia rerum nudis pactis transferuntur*, it would have read as well. Both are rules of positive law, and if we were discussing what the law should most conveniently be, much might be said on both sides; but whether the rule of English law was originally adopted by a misapprehension or not, it is submitted that it is not modern, but the ancient rule such as has existed since English law began.

The case which the learned annotator cites from the Year Book (17 Edw. 4, fo. 1 & 2), as establishing his position that property at that time did not pass by a sale without delivery, is a curious one. The following translation is instructive, partly as bearing on the present subject, and partly as being a very characteristic specimen of the peculiar style of the Year Books.

"In trespass for a close broken, and corn, barley, and grass taken away.

"*Catesby. Actio non*, for long before the supposed trespass the plaintiff and defendant bargained in such a ward in London that the defendant should go to the place where, &c., and there see the said corn, barley, and things aforesaid, and if they pleased him when he saw them, that he should then take the said corn, barley, and grass, paying to the plaintiff 3s. 4d. for each acre, one with the other. And we say that we went there, and that we saw them as aforesaid, and we were well content with the bargain, wherefore we took them, which is the same trespass. Judgment, &c.

(a) *Bailey v. Culverwell*, 2 Man. & Ry. 567, n.

“*Pigot*. This is no plea for divers reasons : one is, that he has said that the place, &c., is ten acres of corn, &c., whereas he should have said ten acres of land sown with corn, &c. Moreover, he hath confessed the taking, and hath not shown how he hath paid the coin to us according to the bargain, for I believe that it was not lawful for him to take them before he had made payment, for it would be most mischievous law that he should have them and not pay, &c. Moreover, when he had seen the grain, &c., he should have notified to us whether he was content with them or no, so that we should know whether he had taken them for that cause, for it cannot be a perfect bargain if it be not that each party is agreed, &c.

“*Catesby*. The plea is good enough for anything that he hath shown ; as to the first conceit, that we have called them acres of corn, &c., and not of land, it is so called *vulgariter*. As to the other conceit that we have passed over the payment of the coin, I believe most bargains in the realm are void if this be law ; but I hold it to be lawful for him to take them on such a bargain before any payment, for it is no mischief, for he can have his action of debt for the money when we have received the thing, wherefore, &c. ; and to my apprehension in every such bargain the law presumes that as the one puts his trust in the other to have the thing for which they have bargained so ought the other, *e contra*. And as for, that we should certify him of our agreement ; it would be very hard if when we were well content with the view of the thing (which is perchance in another country, at a great distance from London), to return thence to show him that ; and, moreover, his bargain upon this point shows that there is no need, for he has put his will into our will, to wit, that if they pleased us on the view of them then we should have them ; by what then could he be better certified than by our taking them, &c.

“*Littleton*. As to the payment, it seems to me that it ought to be stated, otherwise it is no plea. As if I come to a clothier and ask of him how much I shall pay for such a piece of cloth, who says so much, and I say that I will have

it, but I pay him never a penny in hand, whereupon I take the cloth; there he shall have a good action of trespass against me, and it shall be no plea that I bought it without showing that I paid him, and so it is here.

“*Choke*, to the same effect, for a contract cannot be made without the assent of both parties, *quia dicitur de con, quod est simul*; for if you ask me in Smithfield how much you shall give me for my horse, and I say so much, and you say you will have him and pay not the money, do you think that for all that it is my intent that you shall have him without paying the coin? I say no; and I may sell him to another meanwhile, and you shall have no remedy against me, for otherwise I shall be compelled to keep my horse for ever against my will, if the property is in you, and you should take him when you please, which is contrary to reason, and so is it here.

“*Brian*, to the same intent: it seems to me for any words which have been pleaded in this bargain, that it was not lawful for him to take the corn, for it cannot be intended that he meant that the defendant should have the corn without paying the money. But if he had said to him, ‘take and pay when you will,’ or if he had given him a day for payment, then I conceive well that he could take them, and that would be a good bar if it was pleaded to so much; and further, I say that the property is in the defendant by the bargain in the case at bar, and in your cases of the horse and the cloth; nevertheless, he may not take them without the leave of the other. And he shall have a writ of detinue, but the defendant shall be excused by saying he was ready to give it up if the other had paid; and if he bring an action of debt he shall have the same plea. The case is much as where the property remains all the time in me, and nevertheless during a certain time I cannot take it; as where I deliver certain sheep to a man to soil his fields for a certain time; there the property is in me, and still during the time I cannot take them back. For the other point, it seems to me that the plea is not good without showing that he had certified the other of his pleasure; for it is trite learning that

the thought of man is not triable, for the devil himself knows not the thought of man; but if you had agreed that if the bargain pleased you then you should show it to such a one, then I grant you need not have done more for it as a matter of fact. Suppose that I enter into an obligation to you in 10*l.*, payable in two or three days afterwards, on condition that if you please to take such a horse of mine for such a trespass which I have done to you, that then, &c., and you look at the horse, but do not say if he please you or not, wherefore I do not pay the 10*l.* Shall the obligation be forfeited? No! Wherefore, &c.

“*Catesby.* My lord, if he did not take the horse so that his act showed his intention, then you forfeit your obligation; and as for what is said, that there is no need to deliver the thing sold before payment, in the same manner, the other would not be to pay him before he had the thing sold. But as I said before, by law and reason each shall put trust in the other; and if the payment were material, I think we should have seen issues taken upon that in our books; but I have never seen them. Thus I put it, if you bring a writ of trespass against me for taking your horse, and I plead that I bought him on such a day in London in market overt, and then gave him to one B. to keep, who gave him to you and I took him, could you say in that case that I had not paid for the horse?”

“*Choke.* No, for it is not material to the plea.”

“*Pigot.* If I be bound to you in 20*l.* to enfeoff you in such an acre of land on such a day, if you please to accept the feoffment, shall you not be bound to show me your pleasure? Yea, verily, as it seems to me.”

“*Littleton.* I cannot agree that the property is in him who buys by such words without payment; for it is not a clear bargain, but subject to a condition in law, to wit, that if he pays him it shall be good, if not it shall be void. As let us put it that I enfeoff Pigot to enfeoff Catesby: if he will not enfeoff him, my entry is implied by law. So the performance of the condition causes the property to be in him.

“*Catesby.* As to the certification of his consent, I put it

that he had become dumb after the bargain by the act of God, and did not know how to write and was of sound mind, and it seemed to him that the bargain was for his profit. What is he to do? Shall not his seizure be sufficient to prove his will? *quasi de sic*, wherefore, &c.”

And thus ends the report.

“Littleton,” says Lord Coke, “in composing his tenures had great furtherance in that he flourished in the time of many famous and expert sages of the law . . . Sir Thomas Brian . . . Sir Richard Choke . . . and other Justices of the Common Pleas.” According to Beatson’s *Political Index*, Sir Richard Choke was appointed Chief Justice of the Common Pleas in 1462, and on the 9th October, 1471 (a), was appointed a Puisne Judge in the same Court. Sir Thomas Brian was appointed Chief Justice of the Common Pleas on the 29th May, 1472; and Sir Thomas Littleton was appointed a Puisne Judge of the Common Pleas in 1461; and Catesby was made a Judge in 1482; Pigot seems never to have been a Judge at all, so that on the whole it seems that in the 17th Edw. 4, A.D. 1478, Catesby and Pigot were serjeants, arguing before the Common Pleas; and that Brian was Chief Justice, Littleton and Choke, Puisne Judges. The case is a very curious one; but it seems a very strange thing to cite it, as an authority to show that a sale did not pass property without delivery. No such point is made in the cause, the question was on the effect of non-payment. Littleton and Choke seem to have thought that the construction of the contract was, that it was to be a ready money exchange, and that therefore there was no intention to change the property (b). Brian clearly thought that the contract was one of mutual trust, and that the property passed but not the right of possession. His judgment might have been delivered yesterday, as it is precisely what the law now is after the lapse of three centuries and a half. But none of the judges seem to have had the least doubt that the property

(a) There seems to be an error in the Index as to these dates.

(b) It is worth remarking that the crops which seem to have been growing are treated as *goods* throughout the case, and not as part of the freehold.

might be changed without a delivery of the goods. And in a case a few years earlier (2 Ed. 4, 25) it is argued by counsel and agreed by the Court, that "If I give to you my goods at York, and before you take possession of them a stranger takes them, you shall have trespass against the stranger, for by the gift the property was in you." In the 49 Hen. 6, 18, 10 Ed. 4, 19, the same point is stated as an illustration. Choke there says, "This is not like where I purchase a horse for a price of 20 shillings, there forthwith the 20 shillings are due to him, for by the sale the property of the horse is in me, and I can seize him."

"*Catesby*. If I buy a horse of you for 20 shillings, you may keep the horse till I pay you."

"*Choke*. I do not speak to that extent, but I say that the property is in me by the sale; so that if a stranger take him I shall have an action of trespass."

"*Brian to Catesby*. Sir, in your case, if you gave him a day for payment, you cannot detain the horse."

In *Wortes v. Clifton* (a), Lord Coke points out this very thing as an instance of the difference between the civil and the common law, "as the civil law is that a gift of goods is not good without delivery, but it is otherwise in our law." It must be observed, that in a work of very high authority (2 Saunders, 90, n. (e)), it seems to be thought that this applies to a gratuitous parol gift; if it did, the proposition would *a fortiori* extend to a case of sale, but it does not seem that the word "done" in law French does import *primâ facie* that the transaction was gratuitous. It is certainly used in many cases in which there appears to have been a consideration; and there is no case in which it was decided that the property passed, in which it appears affirmatively that the gift was gratuitous; so that there seems no ground to question Lord Tenterden's position in *Irons v. Smallpiece* (b), that Lord Coke's dictum must be confined to cases where there was a binding bargain for a consideration, or a deed under seal.

(a) *Wortes v. Clifton*, Rolle. Rep. 61. (b) *Irons v. Smallpiece*, 2 B. & A. 551.

CHAPTER IV.

EQUITABLE INTERESTS AND ASSIGNMENTS.

So far those interests chiefly which are legal interests in goods have been considered. In this chapter the subject of the creation and assignment of equitable interests is discussed. As questions relating to such equitable interests not unfrequently arise out of contracts for the sale of goods, and as the law applicable to any particular case sometimes depends upon a very critical examination of the facts of that case, the subject is treated at some length without further apology.

Equitable interests in goods or in the proceeds arising from the sale of goods, or in a specific fund, may be created in a variety of ways.

An equitable interest in a specific fund is both created and assigned in the case which is commonly spoken of as an equitable assignment of a debt.

Rodick v. Gandell (a), in 1852, is an instance of this sort; the facts of the case are set out later on (b). Lord Truro, after reviewing all the cases on the subject, said that the principle to be extracted from them was that "An agreement between a debtor and a creditor that the debt owing, shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund," or in other words, "will operate as an equitable assignment of the debts or fund to which the order refers" (c). The relationship

(a) *Rodick v. Gandell*, 1 De G. M. & G. 777.

(b) Page 319.

(c) See *Ex p. Moss*, 14 Q. B. D. 310; *Ex p. Nichols*, 22 Ch. D. 782; *Brice v. Bannister*, 3 Q. B. D. 569; *Tooth v. Hallett*, L. R. 4 Ch. Ap. 242; *Percival v. Dunn*, 29 Ch. D. 128; *Ex p. Hall*, *In re Whitting*, 10 Ch. D. 615; *In re Irving*, *Ex p. Brett*, 7 Ch. D. 419; *Crossley v. City of Glasgow Co.*, 4 Ch. D. 421.

of the parties which Lord Truro is contemplating here, is where A. owes money to B. and B. owes money to C. In the first case which he puts there is an agreement between B. and C., that C. shall be paid out of the money owing by A., and in the second case, B. gives an order to C., in which he directs A. to pay the money to C.

Where a person covenants to assign goods as soon as he becomes the owner of them, but which he has not at the date of the covenant, an equitable interest in the goods is created and passed to the assignee as soon as the covenantor becomes possessed of the goods.

An equitable interest is also created where goods are deposited in the hands of one person upon certain trusts, as for example, to sell the goods and pay over the proceeds or a portion of them to some person. A trust is here created, and the *cestui que trust* has an equitable interest in the goods, or, if they have been sold, in the proceeds of the sale, which are a specific fund on which the trust attaches (a).

Equitable interests of this latter kind have been alleged to have been created in several reported cases where goods have been consigned, and bills of exchange have been drawn "against" that consignment. It will be found on examining the cases that such expressions are not sufficient, even if any evidence of the creation of a trust.

In the simple case where the seller consigns goods to the buyer, drawing on him for the price, and nothing further is said, that merely makes the buyer owner of the goods and debtor for the price. The relationship is that of debtor and creditor and not of trustee and *cestui que trust*. But if goods are consigned and received on the terms that certain bills are to be paid out of the proceeds, then the relationship of trustee and *cestui que trust* is created.

The consignee takes the goods in trust, to give effect to

(a) See the judgment of Jessel, M. R., in *In re Hallett's Estate* in 1879, 49 L. J. Ch. 415; 13 Ch. D. 707, where the following of earmarked, and funds held upon trust was fully considered, as also the meaning of a "fiduciary" relation; and the *New Zealand Co. v. Watson*, in 1881, 7 Q. B. D. 374; *Birt v. Burt*, 11 Ch. D. 773; *Harris v. Truman*, 9 Q. B. D. 264.

those rights which the consignor has reserved, and those rights appear to be in equity, rights not merely *in personam*, *i.e.*, against the consignee, but rights *in rem* against those particular goods, or the proceeds of them, and consequently are good not only against the consignee but against any one who takes the goods or the proceeds subject to the equities which affect them in the hands of the consignee.

The consignee or bailee cannot do anything inconsistent with the contract. The rule of law as stated by Lord Justice Mellish in *Vaughan v. Halliday* (a), is, "that if a remittance is sent for a particular purpose, whether it be by bills or a remittance in money, the person who receives the remittance must either apply it for the purpose for which it was sent, or else return it."

Whether a contract to create a charge upon the goods or on the particular fund arising out of the sale of those goods can be proved depends upon the evidence. But it is not to be presumed from the mere fact that the goods have been consigned and bills drawn on the consignee against or in respect of that consignment, whether it appears that the bills were so drawn either upon the face of the bills themselves or in the correspondence. The acceptance of a bill drawn against goods is merely a promise to pay for the goods according to the tenor of the bill, and is not a promise to pay out of a particular fund (b). A statement that they were so drawn is generally nothing more than a statement of the way in which the right to draw the bill has arisen.

It must also be borne in mind that it is not sufficient to create this trust, that the goods were consigned upon trust. It must be proved that the goods were also received upon that trust. For, in the case where goods are consigned to a person with instructions to apply the proceeds of them to a certain purpose, he is not bound to undertake that duty. He may decline to receive or to hold them for that purpose, and if he does so he has no right to take possession of them, and if they come into his possession he has no right to retain them.

(a) *Vaughan v. Halliday*, 9 Ch. Ap. 568.

(b) *Ex parte Carruthers, In re Higginson*, 3 De G. & S. 570.

If he has made no contract with the consignor he holds them in trust for the owner, and cannot assert any lien over the goods. Until the consignee has undertaken to perform the conditions on which the goods were deposited with him, he has no right either to get or to keep possession of the goods (a).

The next question is, assuming such equitable interests to have been created, can they be assigned?

An equitable assignment is nothing more than an assignment, bad at law but good in equity, of an interest either in goods or in a specific fund, which interest may be either legal or equitable.

Where a debtor, as in the case put in Lord Truro's judgment already cited (b), gives an order to his creditor upon a third person, ordering that third person to pay a specific fund to the creditor, that is an equitable assignment of the fund. But an order to pay out of *any* funds, is not an equitable assignment of any funds (c). In this latter case, however, possibly there may be an assignment which is good in equity, not of an interest but of a contract, just as at law a contract is assigned by the indorsement of a bill of exchange (d).

The question is most commonly raised where goods have been consigned to a person on the understanding that bills are to be drawn on the consignee and to be paid out of the proceeds of the consignment, and the bills have been handed by the drawer to third parties, who set up a claim to have their bills paid out of those proceeds. They assert their claim on the ground that they are holders of the bills, and as such are the assignees of the assignor's equity to have the bills paid out of that security.

Now there was no doubt that in *Ex parte Waring* (e) the security had been deposited in trust to pay the bills; there is no doubt also that the holders were the indorsees of those

(a) *Shepherd v. Harrison*, 40 L. J. Q. B. 148; 5 E. & I. Ap. 116; *ante*, p. 214.

(b) *Ante*, p. 291.

(c) See *Percival v. Dunn*, 29 Ch. D. 128.

(d) See also the Judicature Act, 1873, s. 25, sub-s. 6, and *Walker v. Bradford Old Bank*, 12 Q. B. D. 342 and 511.

(e) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.

bills. Yet it is quite clear from Lord Eldon's judgment that they had no equitable right to that security, but were mere creditors on the bills. An equitable interest had been created, but it had not been assigned.

The indorsement of the bill is a mere assignment of the debt, and not an assignment of the right to have the securities appropriated. The holder of the bill is, if the debtor accepts the bill, a mere creditor on the bill of both the drawer and acceptor. If the debtor does not accept it, the holder is not even a creditor of the debtor, but merely a creditor of the assignor.

But if, besides the indorsement of the bill, there is evidence to show an intention to assign an interest in the security as well as the debt, then, whether the debtor accepts the bill or not, the holder is in equity the assignee of the assignor's equitable interest, and has the right to have the securities appropriated to his bill. It does not appear to be necessary to prove that there is any contract between the assignee or bill holder, and the holder of the securities. It seems to be sufficient to show a contract between the assignee and the assignor. The case in its simplest form is where a sum of money is deposited with a person in trust to hold it for the depositor, and the depositor assigns that specific sum to a third party. The assignee has become, in contemplation of equity, the owner of the sum, and has a right to say to the person holding it, Pay it over to me. Just as where he was in contemplation of equity the owner of goods, he would have the right to say to the person holding them, Hand the goods over to me.

Assuming that the goods were deposited on trust, and that there is a good assignment, it must be noticed in passing that the assignee takes his assignor's interest, subject to all equities which affect it in his hands.

It may be important that the debtor or holder of the securities should have notice of the assignment, for the assignee's title is an equitable one only (a), and therefore it seems that if

(a) *In re Freshfield's Trust*, 11 Ch. D. 198.

the holder of the securities had no notice of the assignment, he might, in certain circumstances, safely pay over the fund to any one who had given value for it, and that person would have as good an equity as the assignee, and a better title at law. But if, after notice, the holder of the security hands it or the proceeds to any one but the assignee, he is a wrong-doer.

In these cases, as well as in those where it is the property which is being dealt with, there may be an interest created by estoppel. Although there may have been no actual contract of assignment between the assignor and the assignee, yet the assignor may have made representations as to the facts, the truth of which he might be estopped from denying. And the holder of the securities or debtor may, by representing that he owes the debt, or that he holds the securities or the fund on a trust, estop himself from subsequently denying the truth of those statements. As V.-C. Wigram said (*a*), "Courts, both of law and equity, have held repeatedly that "where a creditor, on whose behalf a stake has been "deposited by the debtor with a third person, receives notice "of that fact from the stakeholder (the third person), the "notice will convert a stakeholder into an agent for and a "debtor to that creditor."

There is a point of some difficulty connected with this subject which has given rise to an arbitrary and unnecessary rule of law, known as the rule in *Ex parte Waring* (*b*). The difficulty arises where securities have been deposited by a consignor on the understanding that certain bills are to be paid out of those securities, and the bills have been indorsed away, and both the consignor and the consignee have become insolvent. It only arises where there was a trust between the consignor, or drawer, and the consignee, or acceptor, to pay the bills out of the proceeds of those goods. Where there is also a double insolvency no difficulty arises where either the drawer or the acceptor remains solvent. Nor does

(*a*) Tudor's Leading Cases in Equity, 4th ed., 778.

(*b*) *Ex parte Waring*, 19 Ves. Jun. 345 ; 2 Rose, 182.

it arise in the case where the drawer has not parted with the bills, but remains the holder of them. He has his right arising out of the contract to have the securities appropriated to the payment of the bills, and to have the balance of the securities, if any, handed over to him. But if he has indorsed away the bills, the difficulty does arise, for the holders have no right in themselves to have the securities appropriated in that manner if they have made no contract with respect to those securities; they are mere creditors on the bills; they are merely assignees of the debt by the indorsement of the bill, but not of any equity to have the debt paid out of a particular fund.

The rule in *Ex parte Waring* (a) was first adopted by Lord Eldon in that case, and has been since followed as a rule of law by all the Courts.

The difficulty or complication may be stated in many ways, but it is only a statement of an apparent, and not of a real difficulty, as will be seen when examining the Scotch procedure in such cases later on (b).

If the case be considered from the point of view of the trustee in bankruptcy of the drawer, the difficulty seems to be this. He wants to get possession of the securities. This he can only do by giving up the bills of exchange to the acceptor's trustee. If, in order to do this, he pays the bill holders in full, and so gets back the bills from them, and then exchanges the bills for the securities, he not only pays the holders in full, which is to prefer them to the other creditors of the drawer, but the bill holders are paid exclusively out of the drawer's estate, whereas being also creditors on the acceptor's estate they should have been partly paid out of that estate, and so the acceptor's creditors get an advantage at the expense of the drawer's creditors.

The case may be considered from the point of view of the acceptor's trustee. He can only make use of the securities for the purpose of paying the bills; the securities having

(a) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.

(b) Page 336.

been deposited for that purpose only; but the bill holders have no right to say to him, "You *must* make use of them for that purpose." And if he does make use of them for that purpose, he gives the bill holders a preference which he was not compelled to give and has no right to give. On the other hand, if he does not so make use of them, they remain in his hands unavailable, for the drawer being also insolvent cannot pay the bill holders in full, and until that has been done, he cannot get them back into his possession.

The difficulty was simply a practical one—how to make the securities available in such a complicated state of circumstances. The rule laid down by Lord Eldon for the first time in *Ex parte Waring* (a) enables the bill holders to avail themselves of the equity of the drawer, and to have the securities appropriated in the hands of the acceptor to their bills. The rule is applied in cases of a double bankruptcy or insolvency, or a bankruptcy and an insolvency, where both estates are under the control of the Court, and whether the bill holders had or had not notice that the securities had been deposited to meet the bills, and whether the security belonged to the drawer and was pledged with the acceptor, or belonged to the acceptor and was pledged with the drawer.

The cases which appear to bear out these propositions will now be considered in the following order for the sake of simplicity. Firstly, those cases where the question was, Were the goods deposited upon trust? (below); secondly, the assignment of an equitable interest (page 316); and thirdly, the rule in *Ex parte Waring* (a) (page 330).

Firstly. Were the goods or other security deposited and received upon a trust?

In *Tooke v. Hollingworth* (b), in 1793, the plaintiff in Manchester, and Daniel in London, had agreed that the plaintiff should draw from time to time on Daniel, remitting him light guineas and bills to meet the acceptances. Daniel absconded and was declared bankrupt, and the defendant was appointed his assignee. The plaintiff, who was ignorant of

(a) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.

(b) *Tooke v. Hollingworth*, 5 T. R. 215.

these facts, remitted to Daniel certain guineas and bills—the subject of this action in trover—which came into the possession of the defendant. The plaintiff paid the bills when due, and Lord Kenyon, C. J., and Ashurst and Grove, JJ., held that the plaintiff was entitled to have the securities returned to him. Buller, J., took a different view, and was of opinion that the plaintiff was not entitled to recover, apparently on the ground that the parties had not a particular transaction only in their contemplation, but had come to a general agreement which was to form the basis of a general dealing between them to any extent, and to be continued to an indefinite length of time. There is nothing in the judgments of the other three Judges to show that this distinction was not present to their minds. They appear to have decided the case on the broad ground mentioned in the judgment of Ashurst, J. (a), that “where goods are sent by one man to another for a particular purpose, and they have not been “(and cannot be) applied to that purpose, the former may “recover them back again.”

In *Walker v. Birch* (b), in 1795, J. Forbes deposited certain cotton with Greaves and Co., who promised to pay the proceeds to J. Forbes, when and as received. J. Forbes was the agent of Caldwell and Co. Caldwell and Co. were indebted to Greaves and Co., and both became bankrupt, and Greaves and Co.'s assignee claimed to assert a lien over the cotton and to retain the proceeds. But the Court held that they had no lien; for Greaves and Co. had expressly undertaken to pay over the proceeds. The fact that J. Forbes was the agent of Caldwell does not appear to have been communicated to Greaves and Co. And Lord Kenyon, C. J., did not think that was of much importance.

In *Bernales v. Fuller* (c), about 1810, the defendants were bankers with whom the plaintiff, as holder, had deposited a certain bill of exchange, payable at their house. Fuller, who was the acceptor, sent a clerk to Fuller's with money to pay

(a) 5 T. R. 228.

(b) *Walker v. Birch*, 6 T. R. 258.

(c) *Bernales v. Fuller*, 14 East, 590.

the bill. The clerk placed the money on the counter, saying he had brought it to pay the bill. Fuller's clerk took the money, but said he must see Fuller before giving up the bill, and subsequently declined either to give it up or return the money. The Fullers believed they had a right to do this, having a banker's lien over Puller's money in account with him. The plaintiff contended that the money had been paid to the Fullers for his use. Lord Ellenborough, C. J., was at first of opinion that there had been no receipt of the money for that purpose. But a new trial was granted, on the ground that as the Fullers did not at once refuse to receive it they must be taken to have received it for that purpose.

In *Williams v. Everett* (a), in 1811, Kelly, who was a merchant at Capetown, wrote to the defendant, his correspondent in London, enclosing two bills and requesting him to pay the proceeds of the bills to certain persons, one of whom was the plaintiff, and he added that he desired "the amounts paid each person to be put on the back of their respective bills." Kelly appears to have advised the plaintiff that he had sent the bills to the defendant with the above instructions, and the plaintiff then applied to the defendant for payment. The defendant declined to act on Kelly's instructions and refused to pay the plaintiff, but he subsequently received payment of the bill sent by Kelly when it became due. The plaintiff brought this action to recover that part of the proceeds of the bill which the defendant had been instructed by Kelly to pay over to him. It was argued for the plaintiff that the defendant by receiving the bills had undertaken to apply them to the purposes for which they were sent. But Lord Ellenborough, C. J., upholding the nonsuit, said there had been no such assent either express or implied by the defendant, and that Kelly might countermand his instructions respecting the remittances as often as he pleased, and that the defendant would hold the remittances for the use of the remitter himself, until by some engagement with the plaintiff the remittances were appropriated to him.

(a) *Williams v. Everett*, 14 East, 582.

In *Snaith v. Burridge* (a), in 1812, Kieran and Co. of Dundalk, and Graeme and Co. of London had engaged in a joint transaction to supply stores to the Government. Kieran and Co. shipped a cargo of pork to Portsmouth, sending the bill of lading to Graeme and Co., who, being desirous of raising money, pledged it with the plaintiffs, their bankers. Graeme and Co. became bankrupt, and when the cargo arrived the captain refused delivery to the plaintiffs and placed it in the defendants' warehouse. Graeme and Co. appear to have thought they had a right to pledge the cargo as Kieran and Co. were considerably in their debt. But the Court held not. Mansfield, C. J., delivering the judgment, said, "it was clear "that it (the pork) was intended by the shipper to be delivered "into the Government stores, and as he consigned it to "Graeme on these terms, it therefore must be taken to be "accepted by them for that purpose; and if so, it could not "be legally diverted to any other purpose" (b). This case was before the Factors Acts.

In *Frith v. Forbes* (c), in 1862, one question was whether the securities had been received in trust to pay certain bills out of the proceeds. Another was whether the bills had been assigned subject to any equity affecting them. Forbes and Co., the defendants, were the agents in London of Begbie and Co. of Rangoon, upon the terms of a letter which Forbes and Co. had written to Begbie and Co., saying that they would open an account upon which Begbie and Co. might draw, keeping the account at all times covered. Begbie and Co. had sold a yacht for the plaintiffs to the King of Burmah, and received in payment a quantity of teak and cutch. Instead of consigning these direct to the plaintiffs, Begbie and Co. consigned them to Forbes and Co. per the *China*, and advised them of it in a letter in which they stated that they enclosed the bills of lading for certain teak and cutch, "against which we have valued on you at six months sight in

(a) *Snaith v. Burridge*, 4 Taunt. 684.

(b) See also *Burn v. Brown*, in 1817, 2 Stark. 272.

(c) *Frith v. Forbes*, 31 L. J. Ch. 793, and on appeal, 4 De G. F. & J. 409, and post, p. 305.

"favour of Messrs. Frith and Co." (the plaintiffs). The bill of exchange referred to was in these terms: "Six months after sight . . . pay to the order of Messrs. Frith and Co. . . . the sum of 1200*l.* . . . and place the same . . . to account consignment per *China*." Begbie and Co. sent the bills of exchange to the plaintiffs. Forbes and Co. having heard of the insolvency of Begbie and Co. declined to accept them when presented, and claimed to retain possession of the cargo and to set it off against Begbie and Co.'s debt to them on the general account. The plaintiffs filed a bill against Forbes and Co. to have it declared that they were entitled to a charge on the proceeds of the cargo in priority to Forbes and Co.'s lien. Sir John Romilly, M. R., held that they were not so entitled, but on appeal the Lords Justices held that they were.

Lord Justice Turner said: "If a consignee thinks proper to accept an assignment, with express directions to apply it or the proceeds of it in a particular mode, he cannot, as I apprehend, set up his general lien in opposition to those directions. In such a case only what remains after answering the particular directions can, as I think, become subject to the general lien." And speaking of the terms of the letter from Begbie and Co. to the defendants stating that the bill was drawn against the cargo of the *China*, the Lord Justice said those were "terms which could not be construed otherwise than as meaning that the bills were to be paid out of the proceeds of the consignment."

It is to be noticed that this was a very peculiar case, and may be explained as being one where a principal instructed an agent to hand over certain funds to a third person (*a*).

In *Trimingham v. Maud* (*b*), in 1868, the facts, which were complicated, appear to have been that the course of business was for Barron and Co., of Barbadoes, to draw on Rattray and Co., of London, and to sell the drafts in Barbadoes. They also bought bills in Barbadoes, and sent them to Rattray

(*a*) See *Brown, Shipley and Co. v. Kough*, W. N. 1885, 116.

(*b*) *Trimingham v. Maud*, 38 L. J. Ch. 207 ; L. R. 7 Eq. 201.

and Co. for the purpose of keeping them in funds to meet the bills. These remittances were not stated to be sent to cover any particular bills. Rattray and Co. became insolvent, and at that date there were current acceptances of Barron and Co.'s drafts for a large amount. Barron and Co., who had not heard of the insolvency, sent off to Rattray by three mails, remittances which subsequently realized 11,791*l*. By the same mails there arrived from the holders drafts on Rattray and Co. to the extent of 16,000*l*. In their letters, in which the remittances were enclosed, Barron and Co. said, "We beg "to advise the following drafts"; and then followed a list of the drafts for the 16,000*l*., and then they proceeded, "We "enclose the following firsts of exchange," being the remittances for 11,791*l*. now in question. The drafts were not accepted, and Barron and Co. became insolvent. It appears to have been argued for Barron and Co. that the remittances had been sent as cover for the drafts for 16,000*l*., and that as those drafts had not been accepted, they had a right to have the remittances back again. But V.-C. Giffard held otherwise. This case was the subject of observation in *Ex parte Gomez* (a). There does not seem to have been any evidence of an appropriation beyond the fact that the remittances were sent and the drafts were advised in the same letters. They seem to have been sent as cover for all the outstanding acceptances generally.

In *Field v. Megaw* (b), in 1869, the plaintiff was a corn merchant in London. The defendant was a member of the firm of Hamilton and Co., of Belfast. The plaintiff had purchased a cargo of wheat, *ex Maraquita*, and Wedd, being desirous that the cargo should be sold by Hamilton and Co., in Belfast, advanced Field 500*l*., for which Field accepted a bill in which the consideration was described as "value "received in wheat *ex Maraquita*." It was agreed at the same time that the bill should be renewed from time to time until Field should have received the proceeds of the sale, at which time he promised to pay the bill. No notice of this

(a) *Ex parte Gomez*, 10 Ch. App. 647.

(b) *Field v. Megaw*, L. R. 4 C. P. 660.

agreement was given to Hamilton and Co. The plaintiff stopped payment. Wedd claimed the 500*l.* from Hamilton and Co., and they paid that sum to him. This action was brought by the plaintiff to recover back the 500*l.* from the defendant, who represented Hamilton and Co. The plaintiff denied having made the wheat a security for the payment of the 500*l.*, and the Court held that there was no equitable charge. It was an agreement to pay when the proceeds should be received, not a contract to pay out of those particular proceeds.

In the case of *In re New Zealand Banking Corporation, Levi's Case (a)*, in 1869, the holders of bills sought to have certain securities appropriated to those bills.

The New Zealand Banking Corporation had made advances to Levi, which were covered by securities which Levi had deposited with the Corporation. Subsequently the New Zealand Banking Corporation, at Levi's request, granted a credit to White and Co. McKenzie drew bills in favour of Levi on the New Zealand Banking Corporation, who accepted them. These bills were drawn by McKenzie on account of White and Co., and on White and Co.'s credit with the New Zealand Banking Corporation. Both the New Zealand Banking Corporation and Levi were insolvent; and Overend, Gurney and Co., as holders of these last-mentioned bills, sought to have the securities appropriated to the bills of which they were the holders, on the principle of *Ex parte Waring (b)*. But Lord Romilly, M. R., held that the securities had not been deposited to cover those bills, and therefore *Ex parte Waring (b)* did not apply.

In the case of *In re General Rolling Stock Co., Ex parte Alliance Bank (c)*, in 1869, the General Rolling Stock Co. made an advance to Murray, for which he gave his acceptances and deposited the security in question. The Alliance Bank had become the holders of some of these bills, and

(a) *In re New Zealand Banking Corporation, Levi's Case*, L. R. 7 Eq. 449.

(b) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182, *post*, p. 330.

(c) *In re General Rolling Stock Co., Ex parte Alliance Bank*, 38 L. J. Ch. 714; 4 Ch. App. 423.

before they became due but after the Alliance Bank had become the holders, Murray, who was desirous to have the loan continued, accepted, at the request of the General Rolling Stock Co., a fresh set of bills in place of the first set. Both Murray and the General Rolling Stock Co. were insolvent, and the Alliance Bank sought to have the securities appropriated to their drafts, on the rule in *Ex parte Waring* (a). But the Court held that the rule was not applicable; for although the securities had been deposited to cover the first-mentioned bills, Murray's liability on them to the General Rolling Stock Co. had been cancelled by his acceptance of the second set, at a time when the parties had a right to deal with the security as they pleased, and therefore the securities were no longer a security against the first set.

In *Shepherd v. Harrison* (b), in 1871, where the bill of lading was handed over to the consignee on condition of a bill of exchange being accepted, the consignee retained the bill of lading but refused to accept the bill of exchange. The House of Lords held that he had no right of action against the shipowner for refusing to deliver up the goods.

The case of *Robey and Co.'s Perseverance Iron Works v. Ollier* (c), in 1872, was very much like *Frith v. Forbes* (d). A distinction seems to be that in *Robey v. Ollier* (c) there was no evidence of a contract by the defendant to pay the debt out of the proceeds, and in *Frith v. Forbes* (d) there was such a contract.

In *Robey and Co.'s Perseverance Iron Works v. Ollier* (c), in 1872, Brown of Ibraila consigned a cargo of maize, per *Acacia*, to the defendant. Brown was the defendant's agent at Ibraila, but occasionally he made purchases at their joint risk, and this was such a transaction. Brown sent the defendant a letter advising him of the consignment, and saying

(a) *Ex parte Waring*, 19 Ves. Jun., 345; 2 Rose, 182.

(b) *Shepherd v. Harrison*, 38 L. J. Q. B. 105 and 177; 40 L. J. Q. B. 148; L. R. 4 Q. B. 197 and 498; 5 E. & I. Ap. 116.

(c) *Robey and Co.'s Perseverance Iron Works v. Ollier*, 7 Ch. App. 695.

(d) *Frith v. Forbes*, 31 L. J. Ch. 793, on app.; 4 De G. F. & J. 409.

that he had drawn on him against the cargo. He subsequently forwarded the bill of lading. The defendant answered that the drafts "on account of this cargo shall have due protection" Brown was indebted to the plaintiffs, and endorsed the drafts to them. The drafts were in these words:—"Pay to the order of myself the sum of 250*l.*, which place to account cargo per A." The plaintiffs presented the drafts, but the defendant refused to accept, Brown being insolvent. The defendant sold the cargo, and the plaintiffs claimed to have the proceeds appropriated to their bills. James and Mellish, L. JJ., held that they had no such right. James, L. J., said: "I am not prepared to say that merely because a bill of exchange purports to be drawn against a particular cargo, it carries a lien on that cargo into the hands of every holder of the bill. In *Frith v. Forbes* (a) there were grounds for saying that the intention was to give Frith, Sands, and Co. an equitable interest in the cargo, for the letters of the consignor to the consignees referred to bills of exchange which the consignor had drawn in favour of Frith, Sands, and Co. Here the reference is only to bills which the consignor had drawn to his own order, not mentioning any third parties. In *Frith v. Forbes* (a) the cargo was the property of the consignor, who had full right to dispose of the proceeds as he pleased. Here Brown was not the owner of the cargo, but had only a joint interest in it. Moreover, his letters to the defendants were not communicated to the plaintiffs, who did not advance their money on the faith of them" (b).

In *Lutscher v. Comptoir d'Escompte de Paris* (c), in 1876, the plaintiff in London was in the habit of receiving goods consigned to him by one Levy, a merchant at Oran, for sale on commission, and in order that Levy might be put in funds to purchase the goods, agreed to allow Levy to draw on him. The documents of title to the goods were hypothecated to the plaintiff so as to enable him to provide funds to meet the

(a) *Frith v. Forbes*, 31 L. J. Ch. 793, on app., 4 De G. F. & J. 409.

(b) See also *Ex parte Carruthers, In re Higginson*, 3 De G. & S. 570.

(c) *Lutscher v. Comptoir d'Escompte de Paris*, 1 Q. B. D. 709.

bills drawn by Levy. At the request of Levy, the plaintiff arranged for the sale of a particular parcel of goods to be shipped by a vessel chartered by the buyers, and Levy, having drawn upon the plaintiff, purchased and shipped the goods. The bill of lading was handed to Levy, but was not forwarded to the plaintiff. Levy's affairs having been put into liquidation, the liquidator deposited the bill of lading in the hands of the defendants, with instructions not to part with it until they were paid the value of the goods, and they accordingly refused to give it up to the plaintiff. It was held that the plaintiff had an equitable right to the bill of lading, there having been a specific engagement between him and Levy that it should be forwarded to the plaintiff as security for his advance, and that he was entitled to sue the defendants for the wrongful detention of it.

In the *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (a), in the House of Lords in 1873, the course of business was for the New Orleans Bank to draw on the Bank of Liverpool, to sell the drafts in New Orleans, and to remit securities to the Bank of Liverpool, so as to keep that bank out of cash advances. The plaintiffs, the Louisiana Bank, were holders of bills drawn by the New Orleans Bank on the Bank of Liverpool. The New Orleans Bank suspended payment, and the Bank of Liverpool refused to accept the bills, although having in its possession securities of the New Orleans Bank amply sufficient to meet the bills, on the ground that the securities had not been appropriated to the bills, and that therefore they must be returned to the receiver of the New Orleans Bank. The Louisiana Bank filed a bill against the Bank of Liverpool and the New Orleans Bank, and sought to restrain the Bank of Liverpool from paying over the securities to the trustee of the New Orleans Bank, and to have them appropriated to their bills. At the time when the Louisiana Bank purchased the bills, the agent of the New Orleans Bank stated that the bills were drawn against funds

(a) *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, 43 L. J. Ch. 269; 6 E. & I. App. 352. This case was on the same facts as *Thomson v. Simpson*, 39 L. J. Ch. 857; L. R. 5 Ch. Ap. 659.

to a much larger amount already remitted to the Bank of Liverpool.

The Louisiana Bank relied upon two alternative grounds: first, that there had been an equitable assignment of these securities to them; and, secondly, that the New Orleans Bank was estopped from denying that the securities were appropriated to the plaintiffs by reason of the representations of their agent to them.

Lord Selborne, L. C., dealt first with the question of estoppel. His judgment is very instructive. He said:—"I apprehend that nothing can be more certain than this, that the doctrine of equitable estoppel by representation is a wholly different thing from contract, or promise, or equitable assignment, or anything of that sort"; and after pointing out that a representation, to effect an estoppel, must be a representation as to an existing fact, and would not affect an estoppel if it were merely as to the representor's intentions, he proceeded to point out that in this case there had been no representation as to a fact; "for," said he, "the only representation which would have produced an estoppel would have been a representation that the New Orleans Bank had constituted a trust of funds belonging to that Bank, but then in the hands of the Bank of Liverpool, by which the Liverpool Bank might be bound, as trustee, to apply those funds in payment of the bills. The statement which had been made amounted to nothing further than a statement that there were funds in the hands of the Liverpool Bank sufficient to pay the bills."

On the question of equitable assignment, he was of opinion that there had been no contract to specifically appropriate the funds in the hands of the Bank of Liverpool to meet the bills.

The case of *Morgan v. Larivière* (a), in 1875, decided that a letter of credit does not amount to an equitable assignment of the sum mentioned.

In *Ex parte Gomez, In re Yglesias* (b), in 1875, the course

(a) *Morgan v. Larivière*, 44 L. J. Ch. 457; 7 E. & I. Ap. 423.

(b) *Ex parte Gomez, In re Yglesias*, 10 Ch. Ap. 639; see also *Latham v. Chartered Bank of India*, L. R. 17 Eq. 205.

of dealing was for Gomez of Malaga to draw on Yglesias of London, sending him remittances as security. Yglesias stopped payment. A receiver was appointed, and a composition was agreed to and accepted, which, it was not disputed, was binding on all the creditors of Yglesias, including the bill holders; Yglesias' estate was therefore freed from any further claims by them. The Court held that the contract on which the securities had been deposited was a contract of indemnity, and therefore, that the receiver must return the securities to Gomez after deducting the composition.

The case of *In re Entwistle, Ex parte Arbuthnot* (a), in the Court of Appeal in 1876, is very similar to *Robey's Case* (b). A firm in India were in the habit of selling cotton to Entwistle of London. They drew on Entwistle, sending the drafts and bills of lading to their London agents, who presented the drafts to Entwistle for his acceptance, giving him the bills of lading. Entwistle had accepted the drafts drawn in respect of the cotton in question, and had received the bill of lading, and pledged it with a firm of cotton brokers. Entwistle stopped payment, indebted to the brokers, who sold the cotton, and, after bringing the proceeds into account, paid the balance to Entwistle's trustee, without prejudice to the sellers' claim. The sellers claimed it on the ground that the cotton had been specifically appropriated to meet their bills. On the face of the drafts were the words, "Pay, &c., and place the same to account cotton shipments as advised." Both the Indian firm and their London agents and Entwistle had written off the drafts as drawn on account of or against the cotton in question. The Court of Appeal held that there was no equitable assignment, and indeed it seems as if the expressions used were little more than the means adopted for identifying the drafts. Entwistle was a purchaser, and could do what he pleased with the cotton. The contract was nothing more than one by which he undertook to pay a debt, stated by both parties to have been incurred in respect of certain cotton.

(a) *In re Entwistle, Ex parte Arbuthnot*, 3 Ch. D. 477.

(b) *Robey's Perseverance Works v. Ollier*, 7 Ch. App. 695.

In *Ex parte Banner, In re Tappenbeck* (a), in 1876, before the Court of Appeal, Christiansen and Co. of Para, were the agents of Tappenbeck and Co. of Liverpool, and in that capacity they purchased goods at Para, and consigned them to Tappenbeck and Co. They raised funds for this purpose by drawing on Tappenbeck and Co. and selling the drafts. Christiansen and Co. sent the bills of lading and invoices direct to Tappenbeck and Co., and directed them to place the invoice price of the goods to their credit, and the bills, out of the proceeds of which the goods had been purchased, to their debit, in the account between them. Both firms became insolvent, and a consignment of indiarubber, which was on its way, was not stopped *in transitu*, and was taken possession of by the trustee of Tappenbeck and Co. The holders of the bills now sought to have that consignment appropriated to their bills. The Court, after deciding that the property in the indiarubber had passed to the trustee, held that the bill holders were not entitled to the proceeds of the indiarubber. Mellish, L. J., delivering the judgment of the Court, which is one of very great value, pointed out the distinction between a principal consigning goods to his agent for sale, and an agent consigning goods to his principal, and continued, "When a principal consigns goods to his agent
"for sale, the goods in the hands of the agent remain the
"property of the principal, subject to any charge which the
"agent may have on them; and if the principal draws bills
"upon the agent specifically against the goods, that gives
"the agent a right to apply the proceeds of the goods when
"sold in payment of the bills; but subject to that charge the
"goods and the proceeds of the goods remain the property
"of the principal. Where, however, an agent in one
"country purchases goods on account of his principal, and
"consigns them to him in another country, if the agent
"allows the property in the goods and the possession of the
"goods to pass to his principal, the goods become the
"absolute property of the principal, and the agent, in the

(a) *Ex parte Banner, In re Tappenbeck*, 45 L. J. Bank. 73; 2 Ch. D. 278.

“absence of an express agreement to the contrary, has no
“lien or charge upon them in the hands of his principal.
“Nor does it, in our opinion, in the absence of fraud, make
“any difference that the agent draws a bill upon his principal
“for the express purpose of obtaining payment of the price
“of the goods, and that the principal refuses to accept the
“bill unless the agent has taken the precaution of making
“the goods by the bill of lading deliverable to his own
“order, and has transmitted the bill of lading to an agent of
“his own, with directions not to hand it over to the principal
“unless the bill of exchange is accepted. We think that
“the right of an agent in such a case over the goods, as
“against his principal, is the same as that of a vendor as
“against a purchaser. If the agent gives credit to the
“principal and transfers the property in the goods and the
“right to obtain possession of the goods by means of the
“bill of lading to his principal, and fails to stop the goods
“*in transitu*, the trustee of the principal, in the event of his
“bankruptcy, is entitled to the goods. . . . Lastly, we
“have to consider whether there is sufficient evidence of
“Christiansen and Co. having a valid charge upon the goods
“after they had come into the possession of Tappenbeck and
“Co. ; and having a right to have the proceeds of the goods
“applied to the payment of the bills. It was contended for
“the respondent that every person who consigns goods to
“another has a right to give directions how the goods are
“to be disposed of, and that a consignee to whom such
“directions are given must dispose of the goods in the
“way directed or else return them. We admit that this
“is true as a general rule, and that the case of *Tooke v.*
“*Hollingworth* (a) is an instance of the application of it.
“The question, however, is, did Christiansen and Co. give
“any directions to Tappenbeck and Co. that they were to
“sell the goods and were to apply the proceeds in payment
“of the bills of exchange? We think that the argument
“that they did, depends entirely upon a confusion between a

(a) *Tooke v. Hollingworth*, 5 T. R. 215, *ante*, p. 298.

“direction to deal with the proceeds of goods, that is to say, “the sum to be realized by the sale of the goods by the “consignee in a particular way, and a direction to deal with “the invoice price of the goods, that is to say, the price at “which the goods are sold by the consignor to the consignee “in a particular way. Where the consignor directs the “consignee to apply the proceeds of the goods in a particular “way the consignor still remains the owner of the goods, “and if he directs the proceeds to be carried to his credit in “a particular account, and the bills to be placed to his debit “in the same account, that may amount to a direction to “apply the proceeds of the bills in taking up the bills of “exchange. Where, however, a consignor sells goods to a “consignee and directs him to carry the invoice price of the “goods, that is, the debt due from the consignee to the “consignor for the price of the goods, to a particular account, “that does not involve a direction to deal with the goods “themselves or the proceeds of the goods in any particular “way. On the contrary, it admits that the goods themselves “are the property of the consignee, and if the invoice price “of the goods is placed on one side of an account to the “credit of the consignor, and the bills of exchange drawn in “respect of the price of the goods are placed on the other “side of the account, the only effect is, that when the bills of “exchange are paid by the consignee, the debt due to the “consignor for the price of the goods is discharged, but no “charge on the goods in favour of the consignor is thereby “created” (a).

In *Ranken v. Alfaro* (b), in 1877, Y. Alfaro of Costa Rica, consigned coffee to Moses Levy and Co., of London, and in his letter advising them of the consignment, he enclosed a letter of recommendation from Eley Alfaro and Co., authorising him to draw on them, and stated that he had drawn on them on the strength of it. He also stated that Eley Alfaro and Co. had a share in this transaction. Two of the

(a) See also for consignments from principal to agent, *The New Zealand Co. v. Watson*, 7 Q. B. D. 374.

(b) *Ranken v. Alfaro*, 46 L. J. Ch. 832; 5 Ch. D. 786.

drafts came into the possession of the plaintiffs as holders for value. Moses Levy and Co. refused to accept them when presented. When Y. Alfaro heard this, he wrote to Schwartz of London, instructing him to obtain possession of the coffee from Moses Levy and Co., and to sell and honour the drafts with the proceeds. The day before the bills were due, Schwartz wrote to the holders in reference to their bills saying that he expected to receive delivery of the coffee "sent by the drawer against the above," i.e., the bills. He again wrote to the holders saying that he had obtained the warrants for the coffee from Moses Levy and Co., and would dispose of the same as "instructed by sender." Moses Levy and Co. appear to have had some claim against Eley Alfaro and Co., and served Schwartz with an attachment of all goods and moneys belonging to Y. Alfaro. The plaintiffs thereupon filed a bill against Y. Alfaro, Schwartz, and Moses Levy and Co., praying that it might be declared that the coffee had been specifically appropriated to their bills, and that they were consequently entitled to the proceeds in priority to the other parties, and the Court of Appeal held that this was so.

In *Duncan, Fox and Co. v. North and South Wales Bank* (a), in 1879, Duncan, Fox and Co. had sold to Radford and Co. through Maxwell, a broker, certain corn. Radford and Co. accepted bills for the price, drawn on them by Maxwell, and Duncan, Fox and Co. discounted them with the bank. Radford and Co. became insolvent, and Duncan, Fox and Co. were liable on the bills as indorsers. Radford and Co. had deposited security with the bank to secure any balance which might be owing by them to the bank. This deposit was made before the purchase of the corn, and Duncan, Fox and Co. were not aware of it. It was argued for Duncan, Fox and Co. that they were in the position of sureties for Radford and Co. to the bank, and were therefore entitled to have the securities applied to meet the bills. But the Court of Appeal held

(a) *Duncan, Fox and Co. v. North and South Wales Bank*, 48 L. J. Ch. 376; 11 Ch. D. 88.

that they were not so entitled, for although an indorser is a surety for some purposes he is not so for all.

In the case of *In re Gothenburg Commercial Company, Ltd.* (a), in 1881, that company in London had been in the habit of accepting bills drawn on it by a Swedish bank. The Swedish bank from time to time transmitted securities to cover the drafts. The company, as was well known to the bank, frequently realized the securities, and charged themselves with interest on the proceeds from the date when they were realized up to the time when they were required to meet the acceptances. The company became insolvent, having discounted some of the remittances, and having the rest of them in hand. The Court, consisting of Jessel, M. R., Brett, and Cotton, L. JJ., seems to have been very strongly influenced by the consideration that interest was paid by the company, on the ground that a man would only pay interest for money when he had a right to make use of it, and the right to make use of it as he likes is inconsistent with his holding it as trustee for a certain purpose; and held that the bank were only entitled to have the securities in hand appropriated to their bills (b).

This case was followed in the case of *In re Broad, ex parte Neck* (c), in 1884. There the course of business between Thomsen in Sweden and Neck a banker in London was for Thomsen to draw on Neck, and to remit bills to cover the drafts as they matured. Sometimes Neck kept the remitted bills until they became due, and sometimes he discounted them, and in the account between him and Thomsen he credited Thomsen with the proceeds of the remitted bills, and debited him with the amount of his acceptances, interest being both allowed and charged, with an annual settlement. Thomsen drew on Neck, and subsequently remitted to him as cover a draft at sight on Westenholz Brothers, which was accepted by them, and handed by Neck to his bankers and paid at maturity. Neck became insolvent, and the Court of

(a) *In re Gothenburg Commercial Co., Ltd.*, 29 W. R. 358.

(b) See *Banco de Lima v. Anglo-Peruvian Bank*, 8 Ch. D. 160.

(c) *In re Broad, Ex parte Neck*, 13 Q. B. D. 740.

Appeal held that Neck had ceased to hold as trustee, and had become a mere debtor. The Court, as in the former case, seems to have been very much influenced by the payment of interest on the proceeds. But it does seem at least possible that as the settlements were annual, this arrangement about interest may have been made for convenience in keeping the accounts. However, this point seems to have been taken in the former case.

In *Phelps, Stokes and Co. v. Comber* (a), before Bacon, V. C., in 1884, Borland of New York acted as the agent of two firms, one at Liverpool and the other at Pernambuco. C. C. Johnston was the sole partner of the Liverpool firm and a partner with the defendant in the Pernambuco firm. At C. C. Johnston's request, Borland purchased goods in New York, and consigned them to the Pernambuco firm, sending the bills of lading to the Pernambuco firm, and drawing bills on the Liverpool firm, which were indorsed to the plaintiffs, but which were subsequently dishonoured when presented to the Liverpool firm for acceptance. The peculiarity of these bills was that there was a counterfoil attached to each draft, addressed to the Liverpool firm, which informed them that the drafts were drawn against those consignments. The Liverpool firm became insolvent and indebted to the Pernambuco firm, which asserted a right to retain the proceeds. The plaintiffs claimed to have the bills paid out of the proceeds, and were unsuccessful. There seems not to have been a vestige of evidence of any contract by either firm so to pay them.

In *Ex parte Dever, in re Suse* (b), in 1884, Sentance was a merchant at Shanghai, Mussett was a merchant in London, and Suse and Sibeth were bankers in London. Sentance had drawn bills on Suse and Sibeth, remitting them tea, and had discounted them with the Hong Kong Bank; the question was whether the tea was specifically appropriated to meet the bills.

(a) *Phelps, Stokes and Co. v. Comber*, 53 L. J. Ch. 1134; 26 Ch. D. 755; affirmed in the Court of Appeal, 54 L. J. Ch. 1017; 29 Ch. D. 813.

(b) *Ex parte Dever, in re Suse*, 13 Q. B. D. 766; see also *re Richview Brickworks*, (1897) 1 Ir. Rep. 176.

Mussett and Sentance had been in the habit of doing business together, and Mussett requested Suse and Sibeth to grant a credit to Sentance. Suse and Sibeth then wrote a letter of credit to Sentance, authorizing him to draw on them, the drafts to be accompanied by bills of lading, "these documents to be surrendered to us against our acceptances." Under this credit Sentance made various consignments to Mussett, drawing on Suse and Sibeth in respect of each particular consignment. On each draft there was a statement that it was drawn under a letter of credit, and was to be placed to account of the particular consignment as per shipping documents therewith. Sentance discounted all the bills with the bills of lading attached, with the Hong Kong and Shanghai Bank, showing them the letter of credit. When the bills arrived in London, they were accepted by Suse and Sibeth, and the bills of lading were delivered to them. The tea was warehoused on arrival, and the freight was paid by Suse and Sibeth and debited to Mussett in their account with him. As the tea was sold from day to day, Mussett sent a cheque for the amount sold to Suse and Sibeth, who gave Mussett a delivery order. Mussett did not, when paying his cheque, state that it was against any particular acceptance of Suse and Sibeth's. Suse and Sibeth became insolvent, and at that time part of the tea had been sold and part remained in the warehouse. The Court of Appeal held that Sentance was entitled to have the unsold tea appropriated to the drafts, but not the proceeds of that which had been sold. And further, that the bill holders had no rights against the goods, but were mere creditors (a).

Secondly: The assignment of an equitable interest.

In the leading case of *Burn v. Carvalho* (b), in 1839, the facts are set out so perspicuously in the judgment of Lord Cottenham, L. C., that the judgment is given verbatim. "Fortunato, who carried on business at Liverpool, had been

(a) See further on this subject, *In re Pary's Patent Felted Co.*, 1 Ch. D. 361; *Johnson v. Robarts*, 10 Ch. Ap. 505.

(b) *Burn v. Carvalho*, 4 My. Cr. 690. See also *Alexander v. Steinhardt*, (1903), 8 Com. Cas. 209.

“in the habit of consigning goods for sale to Rego, at Bahia, “and of drawing upon him for the expected proceeds; and, “for the purpose of realizing, in this country, the amount of “the bills so drawn, he employed the firm now represented “by the plaintiffs to negotiate these bills; in order to effect “which, they endorsed them, and, having disposed of them, “placed the amount to the credit of Fortunato, for which he “drew upon them. Burn and Co. (the firm represented by “the plaintiffs), having heard that some of these had been “refused acceptance by Rego, and, therefore expecting that “such bills, and the others they had so indorsed, would be “returned to them and payment required of them, applied to “Fortunato, in a letter dated the 4th of April, 1829, request- “ing him to write to Rego, by the first vessel, with orders, “that in case he did not pay the drafts, he would imme- “diately hand over such property as he might have of For- “tunato’s, of an equivalent value to the bills not paid by “him, to their agent, Mr. Vogeler (also at Bahia), whom “they requested to pay the bills for their honour. In answer “to this letter, Fortunato, in a letter to Burn and Co., “dated the 9th of April, 1829, said ‘Agreeably to your “‘injunction, I will write to Mr. Rego per brig *Wavertree* “‘to sail on the 12th of this month, directing him to hand “‘over to Mr. Vogeler property of mine in his hands to “‘cover the amount of bills that eventually may not be “‘paid;’ and, accordingly, by a letter to Mr. Rego, dated “the 11th of April, 1829, he gave the directions to him as “follows:—‘I have engaged and made promise to Messrs. “‘Burn and Co., that you should pass into the hands of “‘their agent in your city, Mr. Vogeler, all the property “‘which might exist in your hands on my account.’ By “a letter of the 11th of June, 1829, Mr. Rego informed “Messrs. Burn (after stating that great part of the goods “which Fortunato had consigned to him remained in his “possession) that he would deliver such goods to Mr. “Vogeler, in consequence of the order so to do which he “had received from Fortunato.

“On the 30th of June, 1829, the goods in question were

“accordingly delivered over by Mr. Rego to Mr. Vogeler,
“and were afterwards sold by him, but did not produce
“sufficient to meet the bills which Messrs. Burn had so
“indorsed; but, after applying such proceeds, they remained
“creditors of Fortunato, upon that account, to a considerable
“amount.

“On the 23rd of June, 1829, a commission of bankrupt
“issued against Fortunato; and he was found bankrupt
“upon an act of bankruptcy of the 23rd of May pre-
“ceding . . .

“It was admitted that there was not a possibility of
“informing Mr. Rego of the letter of the 9th of April,
“1829, before the act of bankruptcy on the 23rd of May.

“The result of this state of facts, which I have taken from
“the admissions, is that Fortunato, being under pecuniary
“obligations to the plaintiffs, and having property in the
“hands of Rego, his agent, promised and agreed to apply
“such property, or a sufficient part of it, to the discharge of
“such liability, and sent directions to Rego for that purpose,
“but became bankrupt before such instructions did or could
“have reached Rego; and the question is, whether such
“promise and agreement did not give to the plaintiffs a right
“in equity to have such property so applied, notwith-
“standing the intermediate bankruptcy of Fortunato; and
“the inquiry is, first, whether the plaintiffs acquired any such
“right against Fortunato: secondly, if they did, whether
“such right can be enforced against his assignees? . . .

“In equity, an order given by a debtor to his creditor upon
“a third person having funds of the debtor, to pay the
“creditor out of such funds, is a binding equitable assign-
“ment of so much of the fund. . . . Here there is an
“existing fund in an agent's hand, and there is a distinct
“contract to discharge the liability out of that fund, and to
“give directions for that purpose. I think, therefore, that
“the letters of the 4th and 9th of April, 1829, amounted to
“an equitable assignment of the funds in the hands of Rego;
“and, if so, how can the subsequent bankruptcy in June,
“upon an act of bankruptcy in May, destroy the effect of

“such equitable assignment? The property in the hands of the assignees was certainly liable to this equity, unless some provision in the bankrupt Acts interfere to prevent it. . . . I am, therefore, of opinion that the plaintiffs had a good title, in equity, to the goods delivered by Rego to Vogeler (a).”

In *Rodick v. Gandell* (b), in 1849, certain railway companies owed money to the defendants, who were their engineers. The defendants owed money to their bankers, who were the plaintiffs. The defendants wrote to the solicitors of the railway companies authorizing them to receive the monies, and asking them to pay the money when received to the plaintiffs. The solicitors then wrote to the plaintiffs, telling them what their instructions were. The solicitors received the money but paid it to the defendants. There was no direction given by the defendants to the railway companies themselves to pay the money to the plaintiffs, nor was any agreement proved between the defendants and the plaintiffs. Lord Langdale, M. R., held that there was no equitable assignment. He said (c), “It seems difficult to ascertain the grounds on which the authority given to a person, who has no interest, to receive, and the promise of the same person to pay when received, can be said to constitute an equitable assignment;” and he pointed out on the following page that this was not inconsistent with the solicitors being held liable at law on their promise. This judgment was affirmed by Lord Chancellor Truro (d).

The facts of this case appear to amount to nothing more than this. The defendant says to one who was his agent for this purpose, “When certain money is paid to you, you are to pay it to the plaintiffs.” The agent then says to the

(a) See also *Malcolm v. Scott*, in 1849, 3 Mac. & G. 29; *Pariente v. Lubbock*, in 1855, 20 Beav. 588; *Holroyd v. Griffiths*, in 1856, 3 Drew. 428; *Acraman v. Bales*, in 1860, 29 L. J. Q. B. 78; 2 E. & E. 456; *Elkin v. Baker*, in 1862, 31 L. J. C. P. 177; 11 C. B. N. S. 526; *Shand v. Du Buisson*, in 1874, 43 L. J. Ch. 508; L. R. 18 Eq. 283.

(b) *Rodick v. Gandell*, 12 Beav. 325; on app. 1 De G. M. & G. 763.

(c) Page 337.

(d) *Rodick v. Gandell*, 1 De G. M. & G. 763.

plaintiffs, "My instructions are to pay the money to you as soon as I get it." There was no contract between the defendant and the plaintiff, and there was no reason why the defendant should not withdraw his instructions.

In *Burn v. Carvalho* (a), Fortunato's own letter stated that he had made a promise to Burn and Co.

The case of *Hoare v. Dresser* (b), in the House of Lords, in 1859, was one of some complication. The same cargoes had been assigned in equity to both the plaintiffs and the defendant, and the real question was whether the plaintiffs at the date of the assignment to them had notice of the assignment to the defendant.

Dresser, of London, had contracted with Norrbom, a timber merchant in Sweden, to sell three cargoes of timber which Norrbom was to consign to him from Sweden. Norrbom wrote to Dresser, saying he had received two charter parties for two of the cargoes and hoped to get the third, and that the cargoes would have to be paid for shortly, and asked leave to draw on Dresser for 1,000*l*. To this Dresser assented, and Norrbom then wrote enclosing copies of charter parties of two vessels, the *Verene* and the *Christiana* (on board of which two of the cargoes were afterwards shipped), and saying that he had authorized a Mr. Frestadius to draw on him for 500*l*. Dresser accepted Frestadius' draft for 500*l*. and paid it at maturity, and he subsequently accepted and paid another of Frestadius' drafts for 500*l*. On the 29th September, Norrbom again wrote to Dresser stating that he expected to receive by the next post the bills of lading of the *Verene* and *Christiana*, and that the captains of two other vessels would complete their loadings next week, and that in a few posts he would send the shipping documents of all four cargoes.

On the 24th October, Hoare and Co., the plaintiffs, received a letter from Norrbom, in which they were requested by him to deliver to Dresser the charter parties of the

(a) *Burn v. Carvalho*, 4 My. & Cr. 690.

(b) *Hoare v. Dresser*, 28 L. J. Ch. 611 ; 7 H. L. 290.

Verene and *Christiana* and bills of lading endorsed in blank (all of which were enclosed) as soon as Dresser should accept a draft of 1,312*l.* (also enclosed), and should make an acknowledgment that Norrbom had performed his contract in all respects. The letter also stated that he (Norrbom) had authorized Frestadius to draw on them for 1,300*l.* This letter from Norrbom to Hoare and Co. was sent through Kleman, who was Hoare's agent in Sweden, Kleman enclosing it in a letter of his own to them, in which he said, referring to Norrbom's authority to Frestadius to draw for 1,300*l.*, that, "knowing Dresser and Co. to be very good, I have not hesitated to assure Mr. Frestadius that you will promptly honour his draft." Two days previously to this Hoare and Co. had received Frestadius' drafts on them for 1,300*l.*

On the receipt of Norrbom's letter and shipping documents on the 24th, Hoare and Co. sent a clerk to Dresser, who presented the draft for acceptance, and informed him of the contents of Norrbom's letter. Dresser was annoyed and declined to accept the draft, saying the proceeding was a strange one, as the cargoes were already his, and that he had made advances to Norrbom in respect of them, and that it was a swindle. Hoare and Co. then wrote to Dresser on the 24th, posting the letter at 11.30, which Dresser received between 12 and 2 o'clock, in which they stated explicitly the conditions on which the bills of lading would be delivered to him. In answer to this, Dresser on the same afternoon wrote that he wished to see the bills of lading, and would return them if he did not accept the bill and make the other acknowledgments, and on the faith of this Hoare and Co. delivered them to him on the afternoon of the 24th. And in the evening of the same day they wrote to Frestadius, "We also give your drafts due protection," and posted the letter the same evening. Frestadius' drafts were subsequently accepted. On the 25th Dresser accepted the draft for 1,312*l.*, and returned it to Hoare and Co., but kept the bills of lading without making the required acknowledgments. He subsequently paid the draft at maturity. Hoare and Co. requested

Dresser either to give his acknowledgments or to take back his acceptance and return the bills of lading.

It was argued for Dresser that there had been an equitable assignment to him of the cargoes of the *Verene* and *Christiana* and then when Hoare and Co. came under a liability in respect of the bills of lading for those cargoes, that they had notice of Dresser's prior equitable title. The case really turned on the second point, the House of Lords being of opinion that Hoare and Co. had not notice of Dresser's claim, even assuming it to have existed, but the case is important, as showing what the Judges considered to be an equitable assignment. Lord Chelmsford, L. C., said, "When the *Verene* and *Christiana* were laden with timber expressly for the purpose of satisfying the contracts which had been entered into on account of Norrbom for the supply of exact quantities shipped for Bristol and for London, Dresser had an equitable title to the property in these cargoes which he could enforce against Norrbom, or against any other person claiming from Norrbom with no better title than he possessed."

"And," said Lord Wensleydale, "I take it to be perfectly clear that in order to create an equitable assignment the obligation must be to deliver a particular chattel, not to deliver any chattel. . . . But in this case, though the contract was, I think, uncertain till the 29th September, there was a positive engagement that the bill of lading of these two cargoes which had been put on board the *Verene* and *Christiana* should be transferred to Dresser, and though Dresser refused to accept the particular bill that was drawn upon him, I think it may be well considered as an appropriation of those two cargoes to him, which would constitute an equitable lien on them in his favour."

In *Frith v. Forbes* (a), in 1862, which has been considered at greater length, *ante*, page 301, there was an assignment of the debt, but the pinch was, was it assigned free from

(a) *Frith v. Forbes*, 31 L. J. Ch. 793; 4 De G. F. & J. 409.

equities? For the determination of this point there was the subsidiary question, were the securities specifically appropriated? Lord Justice Turner put the case in this way: "The bills . . . refer to the consignments, and operate, I think, as orders by Begbie and Co. on Forbes and Co. to pay the bills out of those consignments, and the presentment of the bills by the plaintiffs was a communication to Forbes and Co. of those orders" (a). Begbies had assigned to Frith a debt which was owing to Begbies from Forbes. Begbies then became insolvent. Now this being an equitable assignment, the assignor could only assign it subject to any equities affecting it, and it was argued for Forbes that one of these equities was his lien over the proceeds in respect of Begbie's general indebtedness to him. But the Lords Justices held that Forbes, by accepting the cargo in trust to pay the debt out of the proceeds, had renounced his lien over those proceeds, and therefore could not now assert it.

It must not be forgotten that this case was a peculiar one, and that it was a case of a principal consigning goods to his agent, and not that of a seller consigning to a buyer (b). The plaintiff's title was also good against Begbie, and his assignee could not be in a better position.

The Sale of Goods Act, section 5 (3), provides:—"Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods."

Until the seller does some act irrevocably appropriating the goods to the contract, or possession of them is taken by the buyer under a licence to seize, no legal property passes to the buyer; but if by the contract of sale the goods are so described as to be identified on their acquisition by the seller, the equitable interest in them accrues to the buyer from the moment of such acquisition.

In the case of *Holroyd v. Marshall* (c), in the House of

(a) See also the concluding sentence of his judgment.

(b) See *per* James, L. J., in *In re Entwistle*, 3 Ch. D. 480; and in *Robey v. Ollier*, 7 Ch. Ap. 695.

(c) *Holroyd v. Marshall*, 33 L. J. Ch. 193; 10 H. L. R. 191.

Lords in 1862, Taylor, who was the occupier of a mill, covenanted that he would assign to Holroyd, his landlord, all machinery which might thereafter be brought by him (Taylor) into the mill. The sheriff seized the machinery which Taylor had so brought in, and Holroyd claimed it as equitable assignee. The House of Lords held that he was entitled to it. Lord Westbury said, “. . . It is quite true that a deed “ which professes to convey property which is not in “ existence at the time is, as a conveyance, void at law, “ simply because there is nothing to convey. So in equity a “ contract which engages to transfer property which is not in “ existence, cannot operate as an immediate alienation merely “ because there is nothing to transfer. But if a vendor or “ mortgagor agrees to sell or mortgage property real or “ personal of which he is not possessed at the time, and “ he receives consideration for the contract and afterwards “ becomes possessed of property answering the description in “ the contract, there is no doubt that a Court of equity would “ compel him to perform the contract, and that the contract “ would in equity transfer the beneficial interest to the “ mortgagee immediately on the property being acquired. “ This of course assumes that the supposed contract is one of that “ class of which a Court of equity would decree the specific “ performance. . . . It follows that, immediately on the new “ machinery and effects being fixed or placed in the mill, “ they became subject to the operation of the contract, and “ passed in equity to the mortgagees, to whom Taylor was “ bound to make a legal conveyance, and for whom he, “ in the meantime, was a trustee of the property in “ question ” (a).

In *Collyer v. Isaacs* (b), in 1881, the plaintiff by bill of sale assigned for value to the defendant, a creditor, certain specified chattels at his, the debtor's, place of business, “ and “ all other chattels which might be or at any time thereafter “ be brought thereon in addition to or in substitution

(a) See also *Mogg v. Baker*, in 1838, 3 M. & W. 195.

(b) *Collyer v. Isaacs* (1881), 51 L. J. Ch. 14 ; 19 Ch. D. 342.

"thereof." The plaintiff became bankrupt, and after his order of discharge brought other chattels upon the premises. The defendant did not prove for his debt in the bankruptcy. The action was brought to restrain the defendant, who, under the bill of sale, had entered on the premises and seized not only the chattels enumerated in the schedule to the bill of sale, but also the other chattels, from continuing in possession thereof. It was held that the assignment of the after-acquired chattels, although in form absolute, amounted merely to a contract to assign, for a breach of which the assignor incurred a liability provable in the bankruptcy, and from which he was released by the order of discharge, and that consequently the after-acquired goods could not be seized by the creditor under the bill of sale. Jessel, M. R., said: "A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment. If a person contract for value . . . to settle all such real estate as his father shall leave him by will, or purports actually to convey by the deed all such real estate, the effect is the same. It is a contract for value which will bind the property if the father leaves any property to his son." In other words, even if the contract is in form an absolute assignment, yet it merely operates as a promise to assign until the contract attaches upon specific goods. And if when they come into existence, but before the grantee takes possession, the legal estate and interest in the goods, without notice of the grantee's existing equitable interest, become vested in another person, the latter is entitled to the future-acquired chattels comprised in the grant, and becomes the owner thereof, both at law and in equity (a).

In *Clements v. Matthews* (b), in 1883, the question was

(a) *Joseph v. Lyons*, in 1884, 54 L. J. Q. B. 1; 15 Q. B. D. 280; *Hallas v. Robinson*, in 1884, 54 L. J. Q. B. 364; 15 Q. B. D. 288.

(b) *Clements v. Matthews* (1883), 52 L. J. Q. B. 772; 11 Q. B. D. 808.

again discussed, the facts there being that the tenant of a farm assigned by bill of sale to the plaintiff his stock-in-trade and effects on the farm, together with all the growing and other crops "which at any time thereafter should be in or "about the same or any other premises" of the tenant, and it was held by the Court of Appeal that the description in the bill of sale of the future crops on the farm was sufficiently specific to make a valid assignment of them in equity.

The next case on the subject was *In re Clarke, Coombe v. Carter (a)*, in 1887, where a mortgagor by deed had assigned to the mortgagee all his household goods and farming stock, and "also all moneys of or to which he then was or might "during the security become entitled, under any settlement, "will, or other document, either in his own right, or as the "devisee, legatee, or next of kin of any person;" and also all real and personal property "of, in, or to which he was or "during that security should become beneficially seised, "possessed, entitled, or interested, for any vested, contingent, "or possible estate or interest." The mortgagor afterwards became entitled under a will to a share of the personal estate of the testator. It was held by the Court of Appeal that the assignment of after-acquired property was divisible; and that although the general assignment of all property to which the mortgagor might become entitled might be too wide, the assignment for valuable consideration of all moneys to which he should become entitled under a will operated as a contract which was enforceable, and that the mortgagor's share of the personal estate of the testator was accordingly included in the mortgagor's security.

In *Tailby v. Official Receiver (b)*, in 1888, a bill of sale assigned all the book debts due and owing, or which might during the continuance of the security become due and owing to the mortgagor. It was held by the House of Lords,

(a) *In re Clarke, Coombe v. Carter* (1887), 56 L. J. Ch. 981; 36 Ch. D. 348.

(b) *Tailby v. Official Receiver*, 58 L. J. Q. B. 75; 13 A. C. 523; overruling *Belding v. Read*, 3 H. & C. 955, and *In re D'Epineuil*, 20 Ch. D. 758, and approving *In re Clarke, Coombe v. Carter* (1887), 56 L. J. Ch. 981; 36 Ch. D. 348.

reversing the decision of the Court of Appeal, who had considered that the assignment of future book debts, not being limited to book debts to arise in any particular business, was invalid as being too vague, that even though not limited to book debts in any particular business, the assignment was sufficiently defined and passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mortgagor at the time of the assignment or in any other business.

In each of the three preceding cases it is to be observed that the bill of sale or mortgage was executed prior to the date when the Bills of Sale Act, 1882, came into operation, from which date, the Act provides, every bill of sale given by way of security for the payment of money by the grantor is void unless made in accordance with the form in the schedule, which requires the several chattels and things to be "specifically described" in the schedule to the bill of sale. It is pointed out in *Benjamin on Sale*, 5th ed., p. 136, that the Act of 1882, as well as the earlier Act of 1878, deals only with "bills of sale of personal chattels," which are defined by the Act of 1878 as goods "capable of complete transfer by delivery," a definition which apparently excludes future or after-acquired goods, and it is suggested that if this view be correct, an assignment of future or after-acquired goods is outside the scope of the Bills of Sale Acts altogether (a).

The case of *Reeve v. Whitmore* (b), in 1863, is introduced here, as in it an attempt was made to give to a mere licence to seize after-acquired property the same effect as a covenant to assign after-acquired property, so as to create an equitable interest in such property. Lord Westbury, L. C., said: "A power is a very different thing from an interest; and if the extent and limit of the contract be merely that he should have such a power, then an interest would not arise under the power till the power was exercised" (c).

(a) *Benjamin on Sale*, 5th ed., p. 136; see also *per* Lord Macnaghten in *Thomas v. Kelly* (1888), 56 L. J. Q. B. 66; 13 A. C. at p. 519.

(b) *Reeve v. Whitmore*, 33 L. J. Ch. 66.

(c) *Thompson v. Cohen*, 41 L. J. Q. B. 221; L. R. 7 Q. B. 532.

In *Gurnell v. Gardner* (a), in 1863, Gledhill, who was in debt to the plaintiff, had contracted to purchase some wool from Bradley, but had not paid the whole of the price. The wool was lying at Doncaster, on the defendant's premises. In order to secure the money owing to the plaintiff, Gledhill said to him, "There is the wool which has gone to Doncaster; go and sell that wool; pay Bradley the balance due to him on such wool, and keep the remainder yourself." Gledhill died shortly afterwards. The plaintiff accordingly went to Doncaster and demanded possession, but was informed by the defendant that he had been instructed by Gledhill's administrator not to deliver it. The plaintiff, however, by force obtained possession, and sold the wool; he then paid Bradley the sum owing to him, and kept the balance. The defendant and the administrators commenced an action to recover the value of the wool, and the plaintiff, having no defence at law, suffered judgment to be entered against him, and then filed his bill to have it declared that he was in equity entitled to the proceeds of the wool. Stuart, V.-C., held that there had been a good equitable assignment. It is worth noting that there was no evidence in writing of the equitable assignment.

In *Langton v. Waring* (b), in 1865, the plaintiffs were the assignees in bankruptcy of Hollway, Hart and Co., who had contracted to sell a large number of railway sleepers to the defendants. The cargoes, as they arrived from Dantzic, were discharged at Hollway, Hart and Co.'s wharf, and the timber, which was double the size of a railway sleeper, was sawn in two, and then delivered at the defendants' wharf, about half a mile distant. The question arose as to the last cargo. John Hart, who was one of the firm of Hollway, Hart and Co., called on the defendants to ask them for an advance, and at the interview, as appeared from the evidence, an advance of 600*l.* was made to him on account of this last cargo. He then absconded, and some days afterwards the defendants sent a large number of men, and, against the consent of Hollway,

(a) *Gurnell v. Gardner*, 9 Jur. N. S. 1220; 4 Giff. 626.

(b) *Langton v. Waring*, 18 C. B. N. S. 315.

Hart and Co., carried away the timber. Part of the timber had been sawn into sleepers; part had not.

The plaintiffs, who were the assignees of Hollway, Hart and Co., brought this action to recover the value of the timber. The Court held that they were not entitled, there having been a good equitable assignment to the defendants.

Erle, C. J., said: "My judgment rests entirely upon what "passed at the time that advance was made. It was agreed "on all hands that it was an advance made specifically on "account of the timber in question. The assignees now "claim to keep both the money and the goods. The question "is, whether, as against them, what passed between the "defendants and John Hart at the time of making that "advance did not constitute that 600*l.* a charge upon the "timber, and make it an advance upon the security of that "specific cargo, so as to prevent the assignees, who take all "the legal and equitable rights of the bankrupts, from being "entitled to claim it. I am of opinion that what passed "upon that occasion did amount to an agreement on the part "of John Hart to appropriate this particular timber as a "security for the advance he was asking" (a).

In *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* (b), in 1867, the question was whether the debt had been assigned subject to equities. There Agra and Masterman's Bank had written a letter authorizing Dickson, Tatham and Co. to draw on them for a certain amount, and the letter contained these words: "This credit will "remain in force for twelve months from this date, and parties "negotiating bills under it are requested to indorse particulars "on the back hereof." Dickson, Tatham and Co. drew on Agra and Masterman's Bank, and sold the bills to the Asiatic Banking Corporation, who indorsed the particulars as above requested, and now, as holders, claimed on Agra and Masterman's Bank, who resisted the claim on the ground that Dickson, Tatham and Co. were indebted to them to an amount

(a) See also *Bishop v. Crawshay*, in 1824, 3 B. & C. 418.

(b) *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation*, 36 L. J. Ch. 222; 2 Ch. App. 391.

greater than the bills. But the Court allowed the claim, on the grounds that the letter was addressed to the persons who should negotiate the bills; and that it was a representation to such persons that the bills would be paid. The judgment of Lord Cairns contains the following passage (a):—

“But presuming the contract to have been at law a contract with Dickson, Tatham and Co., and with no other, it is clear that the contract was in equity assignable, and that Dickson, Tatham and Co. must be taken to have assigned (if assignment were needed) to the Asiatic Banking Corporation, and to have been by the writers of the letter intended to assign to them the engagement in the letter providing for the acceptance of the bills. Generally speaking, a chose in action, assignable only in equity, must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities. The essence of the letter is, as it seems to me, that the person taking bills on the faith of it is to have the absolute benefit of the undertaking in the letter, and to have it in order to obtain the acceptance of the bills which are negotiable according to their tenor, and without reference to any collateral or cross claims. Unless this is done the letter is useless.”

The third and last question for consideration is the rule in *Ex parte Waring* (b).

Where the securities are admitted to have been deposited in trust to meet the bills, and both the drawer and the acceptor of the bills is insolvent, and the bills are in the hands of third parties, then the difficulty occurs in winding up the estates, which is met by the rule in *Ex parte Waring* (b).

The facts in *Ex parte Waring* (b), which was decided in 1815, were that Bracken and Co., who were manufacturers, had an account with Brickwood and Co., who were bankers,

(a) 36 L. J. Ch. 226; 2 Ch. App. 397.

(b) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.

and drew on them from time to time, and deposited securities with Brickwood and Co. to cover their acceptances. The bills had been indorsed to third parties, and both Brickwood and Co. and Bracken and Co. became bankrupt; Lord Eldon ordered (a) that the securities should be appropriated specifically to the discharge of the acceptances.

Lord Eldon regarded the case as if the securities had been realized at the moment of the bankruptcy and the proceeds appropriated to meet the bills rateably; if they were not sufficient, the bill holders proving for the unpaid portion; if more than sufficient, the surplus to be paid to the depositors of the security (b). It had been argued that the holders of the bills had some right of their own to have the securities appropriated to their bills, but, said Lord Eldon, "I see " nothing in this transaction, which, supposing a bankruptcy " had not occurred, would entitle those, who are creditors by " the acceptances of the bankers having these deposits, to " maintain an equity upon them: the effect of which would " be, that from the moment of that deposit the bankers " became trustees for those creditors; and could not come to " any new arrangement with those whose debts are to be so " discharged."

Lord Eldon then treated the case in this way: Brickwood and Co. became insolvent in July; Bracken and Co. became insolvent in August; between those dates Bracken and Co. had an equity to have the securities appropriated to the bills, and that equity was not varied by their insolvency, and the bill holders must have the benefit of *that* equity.

In *Powles v. Hargreaves* (c), in 1853, a firm consisting of G. Hargreaves, J. Hargreaves, and Thomas Platt, carried on business at Manchester, Liverpool, and Shanghai. The course of business between the firm and their customers was for the firm to select and purchase goods at Manchester for their customers and to send them to Liverpool, whence

(a) The order in *Ex parte Waring* is set out full length in 3 De G. M. & G. 445.

(b) *Per* Lord Blackburn, in 7 App. Ca. 392.

(c) *Powles v. Hargreaves*, 3 De G. M. & G. 430.

they were consigned to the Shanghai branch of the firm, who sold the goods, purchased other goods, and consigned them back to the Liverpool branch. The firm financed these transactions by drawing on their customers for the price of the goods consigned to China, which bills were accepted by the customers, and the agreement between the firm and the customers was that the return consignments purchased in Shanghai and consigned to Liverpool should be a security in the hands of the firm for the bills so drawn.

For the purpose of getting some bills so drawn by the firm on one Prescott and accepted by him, discounted, a member of the firm informed the manager of the Liverpool Banking Company (the plaintiffs) of the circumstances under which the bills were drawn, and the Liverpool Banking Company discounted the bills on the understanding that the return consignments were to be a security for the payment of the bills. Prescott died insolvent, and when the firm failed the Liverpool branch held certain return consignments in their hands. Lord Cranworth, L. C., and Knight Bruce and Turner, L. JJ., held that the holders had a right to have the proceeds of those consignments appropriated to meet the bills. It is clear from the judgments that the rule in *Ex parte Waring* (a) applies where there is a double insolvency, and is not to be restricted to cases of double bankruptcy.

In the case of *Inman v. Clare* (b), in 1858, the Klingenders, Liverpool merchants, usually employed the Clares, who were cotton brokers, to sell the cotton which they imported, and, requiring money they applied to the Clares, who, on having the bills of lading for certain cotton deposited with them as security, accepted Klingenders' drafts, and the drafts were discounted with the plaintiff. Both the Klingenders and the Clares became insolvent, and Vice-Chancellor Wood held that the plaintiff was entitled to have the proceeds of the cotton appropriated to meet his bills.

In *In re New Zealand Banking Corporation, Hickie and*

(a) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.

(b) *Inman v. Clare*, John. 769.

Co.'s Case (a), in 1867, the point was not decided, but Lord Romilly seems to have been of opinion that the rule in *Ex parte Waring* (b) did not apply where the drawers had deposited security with their bankers, the acceptors, but were so much in debt to them that they would still have been in their debt if the bankers, after paying the bills out of the securities, had kept the balance; for as nothing would under any circumstances be owing to the drawers, they could have no equity to have the securities applied in one way rather than another. In short, that as the drawers could have no equity, the holders could have none. But inasmuch as the position of the drawer and acceptor was, with respect to these securities, determined by the express terms of the contract of deposit, it is by no means clear that it was correct to say that the drawers had no equity.

In the *City Bank v. Luckie* (c), in 1870, Kynaston and Co. had agreed to give Luckie a current cash credit which was secured by the mortgage of an estate in Guiana. Kynaston and Luckie became insolvent, and the plaintiffs, as the holders of the bills drawn by Luckie and accepted by Kynaston and Co., sought to have the security appropriated to the bills; and Lord Hatherley, L. C., decreed accordingly.

In the *Bank of Ireland v. Perry* (d), in 1871, Horne and Co. sold a cargo of maize to Pim and Co.: Pim and Co. sold it to Perry, the defendant, and drew on him on the terms that the bills should be paid out of the proceeds. Perry sold the cargo to Coventry and Shephard. Coventry and Shephard paid Horne and Co. direct, and that left in their hands a sum of 415*l.* due from them to Perry for the maize. Both Pim and Co. and Perry were insolvent, and the plaintiffs, as holders of the bills drawn by Pim and Co. on Perry, sought to have the balance in Coventry and Shephard's hands appropriated to their bills, and the Court of Exchequer allowed their claim.

(a) *In re New Zealand Banking Corporation*, 36 L. J. Ch. 809; L. R. 4 E. 226.

(b) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.

(c) *City Bank v. Luckie*, 5 Ch. App. 773.

(d) *Bank of Ireland v. Perry*, 41 L. J. Ex. 9; L. R. 7 Ex. 14.

In *Ex parte Smart, In re Richardson* (a), in 1872, Stephani of Havana purchased goods of Langs of Bremen. Langs drew on Richardson of London, who accepted the bills. Stephani sent security to Richardson to keep him in funds to meet Langs' drafts. Stephani and Richardson became insolvent, and Langs, who were the holders of the bills, claimed to have such of the security as was in Richardson's hands at the date of his liquidation, applied to meet their drafts. The claim was resisted on the ground that Stephani were not parties to the bills and therefore the rule in *Ex parte Waring* (b) did not apply. But the Court held that it did, Mellish, L. J., saying that if Stephani had drawn on Richardson, had deposited security with him, and had endorsed the bills to Langs, then the doctrine would clearly have applied, and it could make no difference that Stephani got Langs to draw for them. The same learned Judge explained this case in *Vaughan v. Halliday* (c), in 1874. He there said: "In *Ex parte Smart* (a) the holder "was himself the drawer, and although he was not entitled "to prove on the bill against the two firms, he was entitled "to prove against the acceptor, who had accepted for the "accommodation of a firm to whom the drawer of the bill "had sold goods, and he was entitled to prove for the same debt "against that firm for goods sold and delivered. There being "therefore a double insolvency and a double right of proof, we "thought that the principle of *Ex parte Waring* (b) applied."

In *Vaughan v. Halliday* (c), in 1874, Ryder and Co. trading in Brazil, drew on Ashton, of Manchester, in favour of the plaintiff, the holder, and subsequently purchased bills and forwarded them to Ashton to cover the drafts. Both Ryder and Ashton became insolvent, and Ashton refused to accept the drafts when presented. The Lords Justices held that the rule did not apply, for as Ashton had not accepted, there was not that right of double proof which is essential. If the bills were appropriated to the drafts, then as Ashton

(a) *Ex parte Smart, In re Richardson*, 42 L. J. Bank. 22; 8 Ch. App. 220.

(b) *Ex parte Waring*, 19 Ves. Jun., 345; 2 Rose, 182.

(c) *Vaughan v. Halliday*, 9 Ch. App. 568.

had not accepted, Ryder had an unqualified right to have them back. If they were not appropriated, there was no case.

In *Ex parte Lambton, In re Lindsay* (a), in 1875, Lindsay agreed to build a ship for Marshall and Osborne, which was to be paid for by bills drawn from time to time as certain stages of construction were reached, and it was agreed that the ship and materials while in course of construction should belong to Marshall and Osborne. The bills were accepted by Marshall and Osborne, and discounted with Lambton and Co. Before the ship was finished Marshall and Osborne became insolvent and subsequently Lindsay became bankrupt, and Lambton and Co. applied to have the ship appropriated to their bills. But the Court refused the application. Whether the property had passed or not, it was not a case where the ship was held as a security to meet the bills; it was not a case of pledge.

In *Ex parte General South American Co., In re Yglesias and Co.* (b), in 1875, the drawer, Madinya of Guayaquil, sent security to the acceptors, Yglesias, of London, to cover drafts which were accepted. The acceptors were insolvent, and a receiver appointed. The drawer was practically insolvent, but retained the management of his affairs, having come to an arrangement with his creditors to pay them off by instalments. The holders, the General South American Company, were not parties to this agreement, and sought to have the securities appropriated to their bills. The Court considered that the drawer was not under the control of any Court, and although at the time when he deposited the securities he did give authority to appropriate them, yet he might revoke that authority and give any instructions he thought fit, and the Court had no power to interfere, for the rule can only be enforced where both estates are under the control of the Court. James, L. J., said: "No judge has ever expressed an opinion in favour of extending the rule to a case where one of the parties, though practically insolvent, is subject

(a) *Ex parte Lambton, In re Lindsay*, 44 L. J. Bank. 81; 10 Ch. App. 405.

(b) *Ex parte General South American Co., In re Yglesias & Co.*, 45 L. J. Bank. 54; 10 Ch. App. 635.

“to no jurisdiction and cannot be compelled to submit his rights to any Court . . . in my opinion the rule cannot be extended to a case where there is a party whose estate is not under administration.”

The rule in *Ex parte Waring* (a) was further considered in the cases in the note (b).

The rule in *Ex parte Waring* (a) is not applied in the distribution of insolvent estates in Scotland. This was decided by the House of Lords in 1882 in the case of the *Royal Bank of Scotland v. Commercial Bank of Scotland* (c). Ramsay was in the habit of sending yarn to Saunders to be spun, and it was agreed that Saunders should hold the yarn as security for his acceptances of Ramsay's drafts. Both became bankrupt, and the Royal Bank, as holders of the bills, claimed to have the estate of Saunders administered, as it certainly would have been in England, according to the rule in *Ex parte Waring* (a). But the Court held that that rule was not the law of Scotland, and followed the system of dividing the assets adopted there, which seems to be a more equitable one. That system may be most easily seen from the figures themselves. The whole of the claims on Saunders' estate amounted to 40,000*l.*, of which 24,000*l.* were general creditors, and 16,000*l.* were bill-holders. The assets were 9,000*l.*, and the securities 4,000*l.* In dividing the estate the 9,000*l.* were divided rateably, the bill-holders taking sixteen-fortieths, viz., 3,600*l.* The general estate was then indemnified out of the securities, that is to say, the amount paid to the holders, viz., 3,600*l.*, was taken out of the securities and put into the general estate. This sum was now divided rateably, the holders again getting sixteen-fortieths of it, viz., about 1,400*l.* The rest of the security was now used as far as it would go to replace the 1,400*l.* taken by the holders, and was then exhausted, but if it had been larger this process of replace-

(a) *Ex parte Waring*, 19 Ves. Jun. 345; 2 Rose, 182.

(b) *Banner v. Johnson*, in 1871, 40 L. J. Ch. 730; 5 E. & I. App. 157; *Ex parte Dewhurst*, in 1873, 42 L. J. Bank. 87; 8 Ch. App. 965; *In re Barned's Banking Co.*, in 1874, 44 L. J. Ch. 97 and 494; L. R. 19 Eq. 1; 10 Ch. App. 198; *Loder's Case*, L. R. 6 Eq. 491.

(c) *Royal Bank of Scotland v. Commercial Bank of Scotland*, 7 App. Ca. 366.

ment would have gone on again until the whole of the assets, original and replaced, had been divided. The bill-holders would then have gone upon what remained of the security, if anything, for the balance, owing to them, and if there was something remaining over after that, it would have been handed back to the drawer's trustee. The effect of this division is not to increase the amount to which the general creditors are entitled, but merely to indemnify their fund to the amount paid to the holders who should have been paid out of the security.

PART III.

OF THE SELLER'S RIGHTS.



CHAPTER I.

STOPPAGE IN TRANSITU : ITS ORIGIN. IT IS A RIGHT PECULIAR TO ONE WHO STANDS IN THE SITUATION OF SELLER, AND WHO IS WHOLLY OR PARTIALLY UNPAID.

It is superfluous to repeat the modern authorities for the position that by a sale without delivery a legal property passes. But, as has been already more than once intimated, it is not an absolute and unqualified legal property that is transferred : the property passes subject to the unpaid seller's rights.

And this brings us to the consideration of the difficult and important subject of what are the unpaid seller's rights.

It is to be observed, that as a general proposition the person who has the property in goods has *primâ facie*, but not necessarily, the legal right to the possession of them.

And, in general, he who has the property and legal right to the possession of goods, has in contemplation of law the control over them, though in point of fact the actual holder of the goods may wrongfully refuse to obey his directions ; still, as the holder ought to obey, the goods are considered as being in point of law in the possession of the proprietor, and therefore the owner of goods has *primâ facie* all the legal rights and remedies which he would have if the goods were in his own actual possession, or, as it is more technically expressed, "It is a rule of law that the property of personal "chattels draws to it the possession" (a).

(a) 2 Saunders, 89, n.

From this it follows that the buyer has a *primâ facie* right to the possession of the goods; but it is no more than a *primâ facie* right to the possession. The parties may, by the terms of their agreement, bargain that the right of property shall vest in the buyer forthwith, but that the right of possession shall remain with the seller until the fulfilment of any conditions they please, and if there is nothing in the circumstances to show a contrary intention, the parties are presumed to intend to make the payment of the price contemporaneous with the delivery of the possession (*a*). If, therefore, nothing be said in the agreement about the time of delivery or payment, the construction put by the law upon the agreement is, that the seller shall deliver the goods upon payment of the price, and the buyer shall pay the price upon receiving the goods, and either party may at a reasonable time call upon the other to fulfil his part of the bargain, provided he is ready to fulfil his own, but not otherwise; so that neither the seller can maintain any action against the buyer for the price without showing a readiness to deliver the goods, nor the buyer maintain any action founded on the right of possession without showing a readiness to pay the price. But inasmuch as this proceeds on the presumed intention of the parties anything in the agreement which shows that such is not their intention will alter the construction and legal effect of the agreement (*b*).

If, therefore, there is express credit given, and nothing said about the time of delivery, the seller is bound to deliver the goods in a reasonable time if required, but the buyer is not bound to pay the price before the credit expires; for such is the bargain. During the interval between the vesting of the property and the expiration of the credit, the buyer has the rights of property and possession, though the goods have not been delivered nor paid for, and he may in pleading, and for all legal purposes, be considered as possessed of them. But his rights are not indefeasible; and if, before he has obtained possession of the goods, the buyer becomes

(*a*) *Bloxam v. Saunders*, 4 B. & C. 941.

(*b*) Sale of Goods Act, section 28.

insolvent, the unpaid seller, who has parted with possession, has a right to stop the goods *in transitu*—a right which is peculiar to the contract of sale. The unpaid seller has also a lien on the goods, while in his possession, for the price, and that notwithstanding that the property in the goods may have passed to the buyer; and he has also a limited right of re-sale (a).

We come then to treat of the rights of the unpaid seller, whilst he still retains possession of the goods sold, and of that extension of his right which enables him, in the event of the buyer becoming insolvent, to retake the goods after he has parted with the possession, and before the buyer has taken possession. In the natural order of things, it would be more regular to consider the seller's rights whilst in possession, before taking any notice of those rights which he possesses after he has parted with it; but it seems more convenient to reverse this order, and commence by endeavouring to ascertain the extent and nature of the right of stoppage *in transitu*. In the first place, it is to be observed, that when the seller has given the buyer possession under the contract of sale, all his rights in the goods are completely gone; he must recover the price exactly as he would recover any other debt, and has no longer any claims on the goods sold superior to those of any other creditor. The delivery and acceptance of possession complete the sale, and give the buyer the absolute unqualified and indefeasible rights of property and possession in the things sold, though the price be unpaid and the buyer insolvent; unless, indeed, the whole transaction is vitiated by actual fraud. "In this respect," says Lord Tenterden (b), "the law of England is more favourable to the transfer of property, the great subject of commerce, and less attentive to the interest of the seller of goods, than the ancient civil law or the modern law of many European nations, which is chiefly founded on the civil law; for the civil law did not in general consider the transfer of property to be complete

(a) Sale of Goods Act, sections 39 & 44.

(b) Abbot on Shipping, Part III., Chap. IX., 14th ed., pp. 812, 813.

“by sale and delivery alone, without payment or security for
 “the price, unless the seller agreed to give a general credit
 “to the buyer for it; but allowed the seller to reclaim the
 “goods out of the possession of the buyer, as being still the
 “seller’s own property. And by the general law of France
 “in the case of insolvency, the seller who has sold a thing,
 “and still lies out of the money which he was to have for it,
 “if he finds the thing that he sold in the hands of the buyer,
 “may seize on it, and he is not obliged to share it with the
 “other creditors of the buyer; whereas, by the general law
 “of England, when goods have been delivered into the actual
 “or constructive possession of the buyer, they cannot be
 “reclaimed.”

It must be borne in mind, that at the time Lord Tenterden wrote, the *modern* law of most of the Continental nations was what is now the *ancient* law of the same countries, for the *Code Napoleon* was not yet introduced. And this is the more important, because the *Code de Commerce* on this point was framed with the avowed and deliberate purpose of abolishing the ancient law of revendication, and adopting the provisions of the law of England and America (*a*). But the distinctions between the civil law which enabled the seller after delivery to seize the goods as his property, even in the hands of a *bonâ fide* sub-purchaser, unless there had been general credit given, express or implied, and the ancient law of France, which gave the right to recover them so long as they were in specie in

(*a*) The following is Lord Blackburn’s note:—This assertion is made on the authority of a note in 1 *Bell’s Commentaries*, p. 207. I have not seen the documents there referred to, but the quotations seem fully to bear out the statement. But the right of revendication seems to remain when the parties are not traders, but the period during which it must be exercised is cut down to a week, and is confined to the case of a sale without giving of credit. Where credit is given, the seller seems to retain a “*privilege*” or preferable claim to that of ordinary creditors, but to have no right of revendication. “The creditors who have a ‘*privilege*,’ on certain moveables are . . . 4thly, The price of moveable goods sold and not yet paid for, if they are still in the hands of the debtor, whether he bought them on credit or without credit (*à terme ou sans terme*). If the sale was made without credit, the seller may even revendicate the goods so long as they are in the hands of the purchaser, and forbid the resale, provided the revendication is made within a week of the delivery, and that the goods remain in the same state in which that delivery was made.” *Code Civil*, 2102.

the hands of an insolvent buyer, whether there was credit given or not, but made that right cease when the goods came into the hands of a sub-buyer, and the law of England which gives no right of either sort, seem all to have been present to Lord Tenterden's mind when writing these few sentences.

The state of the ancient foreign law is by no means irrelevant to the present inquiry; for there seems but little reason to doubt that the right of stoppage *in transitu* is a modification of the right of revendication, such as it had become by the general law merchant during the middle ages.

"Although," said Lord Abinger, in 1841 (a), "the question of stoppage *in transitu* has been as frequently raised as any other mercantile question within the last hundred years, it must be owned that the principle on which it depends has never been either settled or stated in a satisfactory manner. In Courts of Equity it has been a received opinion that it was founded on some principle of the common law. In Courts of Law it is just as much the practice to call it a principle of equity which the common law has adopted. This was strongly insisted upon by Mr. Justice Buller in his celebrated judgment in the House of Lords in the case of *Lickbarrow v. Mason* (b). It has also been said by Lord Kenyon, that it was a principle of equity adopted by the common law to answer the purposes of justice. The most eminent equity lawyers that I have had an opportunity of conversing with in times that are gone by, were unanimous in repudiating it as the offspring of a Court of Equity. The first case that occurred on this subject affords some authority for the opinion of Mr. Justice Buller and Lord Kenyon. It is the case of *Wiseman v. Vandeput* (c), in 1690. That was a bill filed by the assignees of the bankrupt against the vendor. The Lord Chancellor directed an action of trover to be brought by the plaintiffs, upon which they recovered a verdict. It is clear, therefore, that the

(a) *Gibson v. Curruthers*, 11 L. J. Ex. 145; 8 M. & W. 321.

(b) *Lickbarrow v. Mason*, 4 Bro. P. C. 57; 6 East, 27.

(c) *Wiseman v. Vandeput*, 2 Vernon, 203.

“rule had not at that time been adopted at law. The Lord Chancellor, however, adopted it in equity, and notwithstanding the verdict at law for the plaintiffs, made a decree against them. The next case is that of *Snee v. Prescott* (a). Lord Hardwicke again applied the rule to a certain extent in equity. But it is remarkable that he received evidence of what was the custom of merchants on this point, and he expressly founds his decree upon the evidence of the custom of merchants as well as upon the justice of the case. This decision occurred about the year 1742 or 1743. The next case is that of *Ex parte Wilkinson* in 1755, referred to in *D'Aquila v. Lambert* (b), which took place in 1761. There the Lord Chancellor again grounded his decree on the usage of merchants, and stated that the several previous decisions which had taken place to the same effect had given great satisfaction to the merchants. Numerous cases have followed at law, showing that the right of stoppage *in transitu* under certain circumstances is now part of the common law. Nevertheless, owing perhaps to the doubtful state of its parentage, many unsatisfactory and inconsistent attempts have been made to reduce it to some analogy with the principles which govern the law of contract, as it prevails in this country between vendor and vendee. It is to be observed, however, that the right of stoppage *in transitu* is not peculiar to the law of England. It existed, I believe, in the commercial States of Europe. The cases I have already referred to show that it was practised in the Italian States. That it existed in Holland was proved in a case tried by Lord Loughborough, and mentioned by him in his judgment in the case of *Lickbarrow v. Mason* (c). That it was the law of Russia was also proved in the cases of *Inglis v. Usherwood* (d), and *Bohtlingk v. Inglis* (e). It appears also on reference to the *Chapitre de la Faillit * in the *Code*

(a) *Snee v. Prescott*, 1 Atk. 24.

(b) *D'Aquila v. Lambert*, Ambler, 399.

(c) *Lickbarrow v. Mason*, 1 H. Bl. 364.

(d) *Inglis v. Usherwood*, 1 East, 515.

(e) *Bohtlingk v. Inglis*, 3 East, 381.

“*Napoleon*, that the law of France on this subject is in all
“points similar to our own. It is known that this celebrated
“Code is chiefly a digest of the law of France as it existed
“before the Revolution: indeed, the right of stopping *in*
“*transitu* had before the composition, or digest of that Code,
“acquired the name in the French law of ‘*Revendication*.’
“It may, therefore, be presumed to be a part of the law of
“merchants, which prevails generally on the Continent: the
“proof of which from time to time, combined with its
“manifest justice and utility, has at length introduced it
“into the common law of England, of which the law merchant
“properly understood has always been reckoned to form a
“part.”

In this neat historical sketch Lord Abinger is not quite correct in saying that the right of stoppage *in transitu* exists in the old Continental law. The statement of Lord Tenterden is accurate: the right abroad was different from, and in some respects more extensive than, that given by the law of England. This, however, does not in the least shake Lord Abinger's position, that the right was imported into the English law from the general law merchant, though probably much earlier than the case of *Wiseman v. Vandeput* (a). There is no part of the history of English law more obscure than that connected with the common maxim that the law merchant is part of the law of the land. In the earlier times it was not a part of the common law as it is now, but a concurrent and co-existent law enforced by the power of the realm, but administered by its own Courts in the staple, or else in the Star Chamber. The Chancellor, in the 13 Edw. IV. 9, declares his view of the law thus: “This suit is brought by
“an alien merchant who is come by safe conduct here, and
“he is not bound to sue by the law of the land, to abide the
“trial of twelve men, and other forms of the law of the land;
“but he ought to sue here (in the Star Chamber), and it shall
“be determined by the law of nature in Chancery, and he
“may sue from hour to hour for the despatch of merchants;

(a) *Wiseman v. Vandeput*, 2 Vernon, 203, A.D. 1690.

“and he said further, that a merchant is not bound by statutes
“where the statutes are *introductiva novæ legis*; but if they
“are *declarativa antiqui juris* (that is to say, of nature, &c.).
“And since they have come into the kingdom, the king has
“jurisdiction over them to administer justice, but that shall
“be *secundum legem naturæ*, which is called by some the
“law merchant, which is the law universal of the world.”
And the justices being called on, certified that the goods of
this plaintiff were not forfeited to the Crown as a waif (though
those of a subject would have been), because he was an alien
merchant. It is obvious that at that time the law merchant
was a thing distinct from the common law. This accounts
for the very remarkable fact that there is no mention whatever
of bills of exchange, or other mercantile customs, in our early
books; not that they did not exist, but that they were tried
in the staple, and therefore were not mentioned in the books
of common law; just as the matters over which the Courts of
Admiralty, or Ecclesiastical Courts, have exclusive jurisdic-
tion, are at this day never treated as part of the common law.
But as the Courts of the staple decayed away, and the foreign
merchants ceased to live subject to a peculiar law, those parts
of the law merchant which differed from the common law
either fell into disuse, or were adopted into the common law
as the custom of merchants, and after a time began to appear
in the books of common law. How this great change was
brought about does not appear; but though bills of exchange
were in common use among merchants in the 13th century,
the first mention of one in an English report is in *Cro. Jac.*,
in the beginning of the 17th century; and though the right
of *rei vindicatio* must have prevailed on the Continent from
the time of the revival of the civil law, the first mention of it
in our books is as late as 1690. It seems quite impossible
that such matters should not have been the subject of litiga-
tion in some shape or other in England for centuries before
those times.

This is now merely a matter of curiosity, for whatever may
have been the origin of the right of stoppage *in transitu*, as
it now forms part of the statutory law, and has been so often

the subject of judicial decisions, it is no longer possible to speculate on what the doctrine of the law of England ought to have been ; it is proper to inquire what it is according to the decided cases. But about the end of the 18th century, whilst the reported cases on the subject were few, the question of its origin was of great practical importance. If it was to be considered according to the theory of Mr. Justice Buller, an equitable right adopted into the law, it would follow that it could prevail only against those who had an inferior equity. If it was a legal right depending on the strictness of law, the buyer could not confer a legal right greater than he had himself, and in no case would a third party be in a better position than the first buyer. If it was a right arising from the custom of merchants, the *lex mercatoria* as practised in England, it might be material to inquire what the usage of merchants was, and whether the existence of bills of lading or other mercantile documents made any difference. There was a considerable difference of opinion among the Judges as to the principles on which this important branch of the law was to be administered, till, in the year 1786, there occurred the celebrated case of *Lickbarrow v. Mason* (a), in which the whole law was much discussed, and though no decision was actually come to in that case, the principles of the law were closely scrutinized. From that time we may date the numerous decisions which have formed the law of stoppage *in transitu* into a system of law that leaves a few points open to dispute, but may be considered on the whole as settled.

The statutory right of stoppage *in transitu* is conferred upon the unpaid seller by section 39 (1) (b) of the Sale of Goods Act, which gives him by implication of law, “in the case of
“the insolvency of the buyer, a right of stopping the goods in
“*transitu* after he has parted with the possession of them,” and by section 44 as follows :—

“Subject to the provisions of this Act, when the buyer of
“goods becomes insolvent, the unpaid seller who has parted

(a) *Lickbarrow v. Mason*, 6 East, 21.

“with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.”

The following points seem to be established :—

1st. The right of stoppage *in transitu* is peculiar to one who holds the character of a seller (below).

2nd. It can be exercised only whilst the seller is wholly or partially unpaid (page 354).

3rd. It must be exercised while the goods are *in transitu*, that is, after they have left the possession of the seller, and before they have come to the actual or constructive possession of the buyer, or those who stand in his place (page 361).

4th. It cannot be exercised unless the buyer has failed, or become insolvent (page 411).

5th. It is a right which must be exercised by claiming or taking the goods as by a right paramount to that of the buyer (page 414).

And lastly, it may be defeated before the goods have come to the end of the *transitus*, by the assignment of the bill of lading to one who *bona fide* gives value for a property in the goods, and in no other way (page 417).

The most useful form of proceeding seems to be to collect the different authorities for each of those propositions separately.

The right of stoppage in transitu is peculiar to one who stands in the position of a seller.

Section 38 (2) of the Sale of Goods Act provides that, “In this part of the Act the term ‘seller’ includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for the price.”

In *Kinloch v. Craig* (a), in 1790, a cargo of spirits was con-

(a) *Kinloch v. Craig*, 3 T. R. 783.

signed by a merchant in Edinburgh to his factors in London and stopped, on their insolvency, before it had come into their possession. Lord Chief Baron Eyre said: "The transaction between them was as between principal and factor, and not as between vendor and vendee . . . the right of stopping *in transitu* was out of the question, that never occurring but as between vendor and vendee."

In *Sweet v. Pym* (a), in 1800, the defendant, Pym, was a fuller, and as such had a general lien on the clothes of his customers. He shipped some clothes on which he had this lien, on board a vessel, by the direction of the customer, who at the time was indebted to him, and whose clothes he might, therefore, have retained if he pleased. The customer became insolvent, and Pym succeeded in getting possession of the goods, before the *transitus* was ended; but Lord Eldon, at Nisi Prius, and afterwards the King's Bench, decided, that the delivery on board ship put an end to Pym's possession, and, consequently, to his lien, and that it could not be revived by stopping the goods *in transitu*.

This case must be distinguished from those in which the bailee, who has a lien, makes a bargain with the carrier, by which the carrier is to forward the goods subject to the control of the bailee. There the bailee never parts with the possession at all, for his bargain with the carrier makes the possession of the carrier that of the bailee, and he in consequence keeps his lien till the goods are delivered to the consignee. But in such cases it is quite immaterial whether the consignee is solvent or not, for the bailee does not seek, by stopping the goods *in transitu*, to revive a lien which was lost, but to keep a lien which was never lost because there was never a commencement of the *transitus* (b).

Thus in *Freeman v. Birch* (c), in 1833, the King's Bench decided that a laundress who was in the habit of sending the washed linen to the owner in London, and herself paying the carriage, might maintain an action against the carrier for the

(a) *Sweet v. Pym*, 1 East, 4.

(b) See Sale of Goods Act, section 43.

(c) *Freeman v. Birch*, 3 Q. B. 492, n.

loss of the linen. The Court said, that "she had a special property which had not passed from her. The owner of the linen was not the employer of the carrier, and the risk of the bailee was not over till the goods were delivered."

The point that one who stands in the position of a seller has the right of stoppage, and that no one else has such a right, was decided in two cases arising out of the same bankruptcy. In the first, *Feise v. Wray* (a), in 1802, the facts were, that Browne, who had since become a bankrupt, gave an order to Fritzing, a factor of Hamburg, to procure and ship for him a quantity of wax. Fritzing purchased the wax in his own name, and on his own credit, from persons strangers to Browne; he shipped it in Browne's name, and on his account and risk, and drew bills on him for the price of the wax and his commissions on the purchase. The defendant, who was the agent of Fritzing, stopped the goods *in transitu* on Fritzing's behalf, and the plaintiff, who was Browne's assignee, brought trover against him, contending, amongst other points, that Fritzing was but an agent of Browne with a lien, and could not stop the goods; the King's Bench said the point was worth consideration if it had arisen, but it did not arise. Grove, J., said, "Fritzing may be considered in reality the vendor, for the name of the original owners was never made known to the bankrupt; there was no privity between them, but the goods were purchased and the bills drawn in Fritzing's own name, and therefore, he stands in the situation of vendor as to Browne."

In the second case, *Siffken v. Wray* (b), in 1805, the same parties had a law suit about another transaction. In this case, it appeared that Browne had ordered some corn of Dubois and Co., and desired them to draw for the price partly on his correspondent Fritzing. Dubois and Co. shipped the corn, and drew on Fritzing, who accepted the drafts. Browne became a bankrupt much indebted to Dubois and Fritzing, and not having paid the price of the corn. The

(a) *Feise v. Wray*, 3 East, 93.

(b) *Siffken v. Wray*, 6 East, 371.

defendant, who was Fritzing's agent, took possession of the corn by authority of the bankrupt, but without any authority from Dubois and Co., in trust to sell and apply the proceeds to meet the bills drawn against the corn. The plaintiffs were the assignees of Browne. Lord Ellenborough said: "The defendant had no right from Fritzing, for Fritzing himself had no right to stop the goods *in transitu*. Fritzing's situation in this transaction was very different from what it was in *Feise v. Wray* (a); there he was liable in the first instance for the price of the goods, and, therefore, the Court considered him as a vendor *quoad* the bankrupt here to whom he had shipped them."

In *Newson v. Thornton* (b), in 1805, where pork had been consigned on the joint account of the consignors and consignees, and a bill drawn on the consignees for half the price, it was held that the consignors might stop the goods *in transitu* on the insolvency of the consignees.

In *Morrison v. Gray* (c), in 1824, a merchant in Dundee having shipped goods to a consignee in London, on hearing of the consignee's insolvency, indorsed and forwarded the bill of lading to the plaintiff, his agent in London, for the sole purpose of enabling him to stop the goods *in transitu*. It was held that the plaintiff, although not an indorsee for value, had a special property in the goods sufficient to enable him to maintain trover. In *Wood v. Jones* (d), in 1825, it was held that an agent who had no specific authority to do so, might stop the goods on behalf of his principal, the vendor.

In *Tucker v. Humfrey* (e), in 1828, where the consignor was nearly in the situation of Fritzing, in the case of *Feise v. Wray* (a), but was resident in this country, the whole transaction being English, the Common Pleas assumed his right to stop the goods in the character of seller as indisputable.

(a) *Feise v. Wray*, 3 East, 93.

(b) *Newson v. Thornton*, 6 East, 17.

(c) *Morrison v. Gray*, 2 Bing. 260.

(d) *Wood v. Jones*, 7 Dow. & Ry. 126.

(e) *Tucker v. Humfrey*, 4 Bing. 516.

It seems that in cases where a factor acting for a foreign correspondent purchases goods in his own name, and on his own credit, it is rather too qualified a phrase to say merely that he stands in the position of seller *quoad* the consignee. If he is not the seller, it is difficult to say who is, as there would be much difficulty in establishing any privity of contract between the foreign correspondent and the original sellers. But there is a very gradual progression from this case through those in which the original seller has a right to elect between the liability of the factor and the consignee as principals, up to those cases in which the factor, if liable at all, is liable merely as a surety; and there may, consequently, be some difficulty at times in determining whether an agent can be said "to be in the position of seller," so as to give him a right to stop the goods *in transitu*, on his own account or not.

Although the right of stoppage *in transitu* must be exercised by one who stands in the position of a seller, yet it is not necessary that the property should have vested in him. His interest will be sufficient if he has contracted to have them delivered to him. Thus in *Jenkyns v. Usborne* (a), in 1844, Hunter and Coventry of London had given an order for beans to Lloyd of Leghorn. The quantity shipped was in excess of that ordered, and Hunter and Coventry declined to accept it, but accepted a bill for the amount ordered, and the plaintiff, who was Lloyd's London agent, agreed to take the excess, and received from Hunter and Coventry a delivery order, and accepted a bill for the price. After this, but before the arrival of the beans in London, he sold the excess to Thomas, and sent him the delivery order. Thomas then pledged the delivery order with the defendant. Thomas stopped payment without having paid the plaintiff, and the plaintiff thereupon gave instructions to the captain to withhold delivery. The defendant obtained possession. Tindal, C. J., delivering the judgment of the Court sustaining the verdict for the plaintiff, said, "It was objected that it is only the

(a) *Jenkyns v. Usborne*, 13 L. J. C. P. 196; 7 M. & G. 678.

“owner of the goods who can exercise that right (stoppage “*in transitu*); and that, in this case, the property in the “goods had not vested in the plaintiff at the time of the “stoppage, but only an interest in, and right to receive, a “certain portion of the cargo, to be afterwards ascertained “and appropriated to the parties intended; but we see no “sound distinction, with reference to the right of stoppage “*in transitu*, between the sale of goods, the property of which “is in the vendor, and the sale of an interest which he has “in a contract for the delivery of goods to him” (a).

And although an agent may stop goods *in transitu* on behalf of his principal, yet if he be not the agent at the time of the stoppage it will be ineffectual. In *Bird v. Brown* (b), in 1850, the defendants, who were purchasers of certain bills of exchange which had been drawn on consignees in Liverpool in respect of certain shipments, acting in the seller's interest, but without his authority, stopped the goods on hearing of the consignee's insolvency, and obtained possession. The plaintiffs, who were the assignees of the consignees, demanded the goods, and subsequently an agent, duly appointed by the seller, ratified the act of the defendants. But it was held that the *transitus* was at an end when the goods had reached the port of destination, and when the consignees, having demanded the goods and tendered the amount of the freight, would have taken them into their possession, but for the wrongful delivery of them to other parties.

In *Hutchings v. Nunes* (c), in the Privy Council in 1863, a case somewhat similar to the last, the goods were stopped *in transitu* by a person who had previously done business with the consignors, and who considered himself and was considered by them to be their agent, but he had no express authority at the time of the stoppage to stop the goods. The stoppage was held good by Lord Kingsdown and L. JJ. Knight-Bruce and Turner.

(a) See Factors Act, 1889, s. 9.

(b) *Bird v. Brown*, 19 L. J. Ex. 154; 4 Ex. 786.

(c) *Hutchings v. Nunes*, 1 Moo. P. C. C. N. S. 243.

It has not yet been decided whether a surety for an insolvent buyer has a right to stop *in transitu*, but Mr. Benjamin, in his work on Sale (a), says, "That if a surety for an insolvent buyer should pay the seller, he (may) now have the right of stoppage *in transitu*, if not in his own name, at all events in the name of the seller, by virtue of the provisions of the fifth section of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97)." That section in effect says that every person who, being surety for the debt of another, shall pay such debt, shall be entitled to stand in the place of the creditor, and to use all the remedies, and if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt (b).

The right of stoppage in transitu can be exercised only whilst the seller is wholly or partially unpaid.

There never could be any question made, that if the seller was ever to have the right of stoppage *in transitu* at all, he must have it when he was wholly unpaid; but it was at one time a question whether he could have any such right when partially paid.

In *Hodgson v. Loy* (c), in 1797, the bankrupt had purchased of Cooper 104½ firkins of butter, at 41s. a firkin. He paid him 30l. on account, consented to consider an old account of 20l. due to him from Cooper as paid, and gave Cooper a bill for 100l., in all paying him 150l. on account. Then after his bankruptcy the defendant by Cooper's desire stopped the goods in the hands of a carrier. Some months afterwards, Cooper tendered the assignees of the bankrupt

(a) Benjamin on Sale, Book V., Part I., s. 1, 5th ed., p. 873.

(b) See *Imperial Bank v. London and St. Katherine Dock Co.*, 46 L. J. Ch. 335; (1877), 5 Ch. D. 195.

(c) *Hodgson v. Loy*, 7 T. R. 410.

the bill, which in the meantime was dishonoured, and the 30*l.* The action was trover by the assignees. They contended that stoppage *in transitu* was a rescission of the contract, and therefore could not be exercised when there had been a part payment, at least without an offer to return the price actually paid; and that in this case the tender came too late, and did not include the debt for 20*l.* for which Cooper had given credit.

The Judges at first doubted, and had ordered a second argument on this point, but before the argument they said it was unnecessary. "They were clearly of opinion that the "circumstance of the vendee having partially paid for the "goods, does not defeat the vendor's right to stop them *in transitu*, the vendee having become a bankrupt."

This point is now set at rest by section 38 (1) of the Sale of Goods Act, which provides that "the seller of goods is "deemed to be an 'unpaid' seller within the meaning of this "Act—when the whole of the price has not been paid or "tendered."

Neither does it make any difference, though the goods were sold on credit which had not expired at the time of the stoppage, so that the price was not then due. In two cases which were very much litigated, *Inglis v. Usherwood* (a), in 1801, and *Bohtlingk v. Inglis* (b), in 1803, the litigation arose out of a transaction in which a cargo of goods was shipped on board a vessel chartered by the bankrupt, and according to the terms of the contract "the goods were to be drawn for a "month after shipment." A stoppage *in transitu* made before the lapse of the month was held good; and it does not seem to have been thought worth while even to raise the point that the time had not come when the sellers were entitled to demand payment, if the buyer had remained solvent.

But when the seller has received bills of exchange or other securities for the whole price, the case may seem not so clear. He is not quite a paid seller, for the bills may prove

(a) *Inglis v. Usherwood*, 1 East, 515.

(b) *Bohtlingk v. Inglis*, 3 East, 381.

worthless; he is not quite an unpaid seller, for the bills may prove good. It seems, however, very well settled, that where the seller is not otherwise paid than by having received the insolvent buyer's acceptances, he may stop the goods; though he may have negotiated the bills, and they are still outstanding and not yet at maturity. And this is very reasonable, for it is quite certain that the insolvent will dishonour his acceptances, and all but certain that the holders will fall back on the drawer for payment (a).

The effect of taking a bill or note from the debtor depends on the intention of the parties. *Prima facie*, it merely amounts to an agreement to give the debtor credit for the time it has to run, and the effect is to suspend both the seller's lien and his right to sue for the price of the goods until the bill has arrived at maturity and been dishonoured, or the buyer has become insolvent; but it may have been the intention of the parties that the giving of the bill should be an absolute payment, in which case the seller runs the risk of its being paid, and he is in the same position as if he had been paid in cash. The buyer can no longer be sued for the price of the goods, although he remains liable on the bill (b).

In the case of *Feise v. Wray* (c), in 1802, already cited, Fritzing, the seller, had drawn bills on Browne, the buyer, for the full price. Browne accepted the bills, and Fritzing negotiated them. Browne failed, and the goods were stopped on the 11th of September. The bills did not

(a) See Sale of Goods Act, s. 38 (1) (b).

(b) *Owenson v. Morse*, 7 T. R. 56. On the question of what amounts to payment, see *Bolton v. Richard*, in 1795, 6 T. R. 139; *Read v. Hutchinson*, in 1813, 3 Camp. 352; *Swinyard v. Bowes*, in 1816, 5 M. & S. 62; *Van Wart v. Woolley*, in 1824, 3 B. & C. 439; *Hawse v. Crowe*, in 1826, 1 Ry. & M. 414; *Robinson v. Read*, in 1829, 9 B. & C. 449; *Robson v. Oliver*, in 1847, 10 Q. B. 704; 16 L. J. Q. B. 437. And where the seller elects to take some form of payment other than cash, *Everett v. Collins*, in 1810, 2 Camp. 516; *Brown v. Kewley*, in 1801, 2 B. & P. 518; *Smith v. Ferrand*, in 1827, 7 B. & C. 19; *Marsh v. Pedder*, in 1815, 4 Camp. 257; *Camidge v. Allenby*, in 1827, 6 B. & C. 381; *Alderson v. Langdale*, in 1832, 3 B. & Ad. 660; *Atkinson v. Hawdon*, in 1835, 2 Ad. & El. 628; *Sibree and Tripp*, 15 M. & W. 23; *Goddard v. O'Brien*, 9 Q. B. D. 37; *Bilder v. Bridges*, in 1887, 57 L. J. Ch. 300; 37 Ch. D. 406.

(c) *Feise v. Wray*, 3 East, 93.

arrive at maturity until the 7th of October, when they were dishonoured ; but Fritzing himself had by that time become insolvent, and the bills were not taken up ; yet the stoppage was held good, the King's Bench saying that the right of the holder of the bills to prove against the estate of Browne could not have more effect than part payment.

In *Patten v. Thompson* (a), in 1816, the plaintiffs had drawn on the buyer for the price, and held his acceptances, which were not due at the time they stopped the goods, yet the stoppage was held good.

In the case of *Wood v. Jones* (b), in 1825, Brightman, of Newcastle, had consigned to the plaintiffs, Quebec merchants, goods to be sold for his account. The plaintiffs then shipped to Brightman three cargoes of timber, but not specifically in return for Brightman's consignment. The plaintiffs drew on Brightman to cover the third cargo. Two of the cargoes arrived : Brightman dishonoured the bill, and the plaintiffs' agent, believing that Brightman's consignment would not cover the value of the timber, stopped the third cargo on board the defendant's ship. It was argued for the defendant that a stoppage *in transitu* cannot be made on a mere apprehension that the goods in the hands of the consignor might not ultimately be sufficient to cover the consignment, and that to justify a stoppage *in transitu*, the agent must be in a position to show that upon a balance of the accounts at the time the stoppage is made his principals had a specific liquidated demand against the consignee. The Court held the stoppage to be good, Abbott, C. J., saying, "that if the cargo "in question had been intended as a return for the goods "consigned by Brightman there would have been a great "deal of weight in the argument."

In *Edwards v. Brewer* (c), in 1837, the Exchequer would not listen to an attempt to argue that the seller who held the buyer's acceptance not yet at maturity, could not stop the goods without tendering the acceptance.

(a) *Patten v. Thompson*, 5 M. & S. 350.

(b) *Wood v. Jones*, 7 Dow. & R. 126.

(c) *Edwards v. Brewer*, 2 M. & W. 375.

Against these cases is to be set the *Nisi Prius* decision of Lord Ellenborough in *Davis v. Reynolds* (a), in 1815, which certainly seems inconsistent with them. There Peacock and Company, the sellers, held the buyer's acceptance for the goods; the buyer sold the goods to Davis, the plaintiff, whilst yet at sea, and endorsed to him the bill of lading; but it was not stamped, and therefore could not be proved; then Peacock and Company stopped the goods, and got them from the defendant, a wharfinger, under an indemnity. The plaintiffs recovered in trover, and Lord Ellenborough is reported to have said, that "till the time of credit had expired, and the bill was either paid or dishonoured, Peacock was in the situation of a paid vendor." The only possible distinction between this case and those previously cited, is that there had been an assignment for value in this case, but unaccompanied by taking possession or by proof of the indorsement of the bill of lading. In *Dixon v. Yates* (b), a countermand of authority to receive the goods under circumstances precisely similar, but made after the bill accepted by the intermediate purchaser was at maturity and dishonoured, was held good. The case is an authority, that the taking of the insolvent's acceptances by the seller has no effect on the seller's right as against a sub-buyer (who has not taken an indorsement of a bill of lading), after the acceptances are dishonoured. And *Feise v. Wray* (c) is an authority that the taking of the buyer's acceptances does not suspend the seller's right to stop the goods, as against the original buyer. *Davis v. Reynolds* (d) is a decision that it does suspend them as against a sub-buyer. The reason of this distinction is not obvious: the probability is, that Lord Ellenborough, though as a Judge he could not read the bill of lading for want of a stamp, was not able to prevent his judgment being warped by the natural feelings of repugnance to the effect on evidence of the stamp laws (certainly for long

(a) *Davis v. Reynolds*, 4 Camp. 267.

(b) *Dixon v. Yates*, 5 B. & Ad. 313, *post*, p. 370.

(c) *Feise v. Wray*, 3 East, 93, *ante*, p. 350.

(d) *Davis v. Reynolds*, 1 Stark. 115.

the most clumsy and unjust provisions in English law); and that he was astute to defeat the stamp laws, an error not without precedent amongst Judges. The case, however, has never been expressly overruled.

When the seller has received payment from the holder of the bill, and is not liable to take it up, he is paid in every sense of the word. Thus in *Bunney v. Poyntz* (a), in 1834, where the agent of the seller took in payment a promissory note, payable to his (the agent's) own order, negotiated it and embezzled the money, and the note was afterwards dishonoured, the King's Bench held that the seller was paid. His agent had received the money, and the fact that he had misapplied it was wholly immaterial as between the parties to the action, and as the seller could not be made to refund, he must be considered as paid. The fact that he had really received no benefit from the note, gave his claim a colour of justice, but on examination it was quite immaterial.

In *Vertue v. Jewell* (b), in 1810, there was a running account between two parties, in which were included bills of exchange not yet at maturity; and the party who on the balance of the account was the debtor, consigned goods on account of and to meet this balance. Before the goods arrived the consignee became bankrupt, and if the bills for which he had credit were struck out of the account, the balance would be the other way. The consignor stopped the goods, and the action was trover by the plaintiff, who represented the consignee, against the defendant, who represented the consignor. Lord Ellenborough ruled, that "the consignor being at the time of the consignment indebted on the balance of accounts, divested him of all control over the barley from the moment of shipment. The non-payment of the bills of exchange cannot be considered." And this ruling was approved of by the King's Bench.

(a) *Bunney v. Poyntz*, 4 B. & Ad. 568; and see Benjamin on Sale, 5th ed., p. 830, where this case is discussed and commented on.

(b) *Vertue v. Jewell*, 4 Camp. 31.

Perhaps, however, this was rather a case of pledge than sale, as it seems difficult to suppose that the parties did not from the first intend the surplus, if any, to be accounted for. If so, the consignees had clearly a special property in the consignment, and the insolvency and probable dishonour of the bills could not divest that special property, though it probably would very materially affect its ultimate value. In *Patten v. Thompson* (a), Lord Ellenborough in delivering judgment said, "I have looked into the case of *Vertue v. Jewell* (b), and find that there the bill of lading was indorsed "and sent by the consignor, on account of a balance due from "him, including several acceptances then running, so that it "was in the nature of a pledge to cover those acceptances." The case, therefore, is perhaps rather an authority for the first proposition, "that the right of stoppage *in transitu* is "peculiar to a seller." It is suggested in Mr. Benjamin's work on Sale (c), that the explanation of the case by Lords Ellenborough and Blackburn is the true one, and that what the Court in *Banc* probably meant was that on the consignment of the goods a special property vested in the consignees as pledgees.

There is no reported case in which the seller had taken, on account of the consignment, the acceptance of a third person (d); but it would seem on principle in such cases, that until the bill is dishonoured he must be considered as paid, as the insolvency of the buyer does not involve in it any necessity of the badness of the bill; but when the bill is dishonoured, then as the seller might sue the buyer for the price if he remained solvent, it would seem that he must be considered as an unpaid seller for all purposes.

(a) *Patten v. Thompson*, 5 M. & S. 350.

(b) *Vertue v. Jewell*, 4 Camp. 31.

(c) Benjamin on Sale, 5th ed., p. 878.

(d) But see *Read v. Hutchinson*, in 1813, 3 Camp. 352; *Swinyard v. Bowes*, in 1816, 5 M. & S. 62; *Robinson v. Read*, in 1829, 9 B. & C. 449; *Robson v. Oliver*, in 1847, 16 L. J. Q. B. 437; 10 Q. B. 704; *Belshaw v. Bush*, in 1851, 22 L. J. C. P. 24; 11 C. B. 191.

The right of stoppage in transitu must be exercised while the goods are in transitu, that is, after they have left the actual or constructive possession of the seller, and before they have come to the actual or constructive possession of the buyer, or those who stand in his place.

Before the seller has parted with the actual or constructive possession of the goods the *transitus* has not commenced, and no stoppage is required to give the unpaid seller his rights: he retains them in respect of the possession with which he has not parted. And after the buyer, or those who stand in his place, has acquired the possession of the goods, the stoppage comes too late to give the seller any of his rights, for the possession has rendered the buyer's rights of property and possession indefeasible and absolute. It is only whilst the goods are in an intermediate state—out of the possession of the seller, and not yet in that of the buyer—that the right can be exercised.

And here it may be as well to state a little more accurately what is meant by the word “possession” in this place, for it is used in a narrower and more restricted sense than in the general technical legal import of the word, and yet in a more extended sense than its popular meaning. For in general, in technical language, one is said to be possessed of goods when he has the property, and an immediate right to have the goods dealt with as he will; yet, a buyer on credit of a specific chattel, who has the property, and whilst solvent, the right to deal with the goods as he will though they remain in the seller's hands, and who, therefore, in general legal language, may be called possessed of them, has never had such possession as will determine the seller's rights in case the buyer becomes insolvent. And yet, circumstances far short of an actual delivery into the hands of the buyer amount to such a constructive possession as is sufficient to render the buyer's property indefeasible.

Before the sale is complete the property in the goods remains in the seller, and the actual custody of the goods is

either in the seller himself, or in someone who holds them as his bailee; and though by the completion of the sale, the property in the goods is at once transferred to the buyer, so as to give him the rights and liabilities attending the proprietor; and though the right of possession may also be transferred, so as to give the buyer the rights and remedies belonging to the possessor of the goods, yet, the privity of contract with the seller's bailee is not transferred with the property and right of possession. The person who has the actual custody of the goods may be liable as a *wrong-doer*, if he in any way interferes with the buyer's right of possession, but he has no *contract* with the buyer; he continues to hold the goods under his old contract with the seller until something is done to alter the capacity in which he holds them. Till then, they are in cases of this nature said to remain in the possession of the seller and even if the buyer before his insolvency had the immediate right of possession, the unpaid seller's right remains unaltered.

But when either the actual custody of the goods has been shifted into the hands of one who from the first held them as the bailee of the buyer, or the person holding them has changed the character in which he holds them so as to become the bailee of the buyer, the goods are said to be in the possession of the buyer. In the first case they are often said to be in his actual possession, in the second in his constructive possession. Neither phrase is quite accurate, and there is no legal distinction between the two: in both cases alike the seller's rights are gone. And the same law is true, when the party who thus takes possession is one who has acquired the buyer's rights, either by bargain or operation of law.

It is whilst the goods are in an intermediate state, and in the custody of one who holds them, neither by virtue of a contract to keep them made with the seller, nor by a similar contract with the buyer, but as an agent undertaking to forward them from one to the other, that the goods are *in transitu*.

The important question, therefore, in every case is, in what

capacity are the goods held by him who has the actual custody? In many cases this is quite clear, but in others it is an exceedingly difficult question to answer, more especially where the goods remain in the same custody, and the question is, whether the character of the holder has been changed, and at what time it was changed. It becomes then a question depending upon what was done, and what was the intention with which it was done; and as the acts are often imperfectly proved, and in themselves equivocal, and the intention often not clearly known to the parties themselves, it is not surprising that there should be much litigation upon the point; the general principles, however, seem to be those above stated.

Before collecting the cases on the commencement and determination of the *transitus* (a), it will be as well to collect those cases which decide when the seller's possession ends, and the buyer's possession begins, when there is no *transitus*. The principles are precisely the same: indeed, so much so, that cases of this class are frequently, though inaccurately, called cases of stoppage *in transitu*.

Formerly where the goods were in the hands of the seller himself or his immediate servants, he held them as seller and retained his rights, unless it could be shown that he had agreed to hold them in a new character. Where this could be shown, he lost his rights, though he might never have parted with the actual possession; but section 41 (2) of the Sale of Goods Act now provides that "the seller may exercise his "right of lien notwithstanding that he is in possession of the "goods as agent or bailee for the buyer." Where the buyer has transferred his rights to a third party, it is very likely that the original seller should agree with him to continue to hold the goods as his warehouseman, without retaining any interest in the goods, which have by the subsale, become the property of one who is not the seller's debtor; and this is particularly likely, when the credit given by the seller to the first buyer is longer than that given to

(a) *Post*, p. 378.

the sub-buyer by the first buyer. Accordingly, when there is a sub-buyer, an agreement on the part of the seller to consider himself the sub-buyer's bailee, may be proved by comparatively slight evidence.

In *Stoveld v. Hughes* (a), in 1811, the facts were, that Hughes had sold Dixon and Co. a lot of timber lying on his wharf. They marked the timber in his presence with their mark, and accepted a bill at three months for the price. Whilst the bill was still running, Dixon sold the timber to Stoveld, whose agent told Hughes of it. Hughes said, "Very well," showed the agent the timber, and assisted to change the marks on it. Stoveld paid Dixon; then Dixon failed before the bill became due, and Hughes claimed to retain the goods against Stoveld, until he was paid the price due from the first buyer; but the King's Bench held, that he could not retain them. Lord Ellenborough said: "When the sale by Dixon to the plaintiff was made known to the defendant Hughes, he assented to it by saying, 'Very well,' and to the marking of the timber by the plaintiff's agent, which took place at the same time. If that be not an executed delivery, I know not what is. . . . If, indeed, the marking of the timber by the plaintiff's agent had not been done with the knowledge and consent of the defendants, the vendors, it may be admitted, for this purpose, that they would not have been bound further than they were already, by what had taken place as between them and the original vendees."

Section 47 of the Act provides that, "Subject to the provisions of the Act (b), the unpaid seller's right of lien or stoppage *in transitu* is not affected by any sale or disposition of the goods which the buyer may have made unless the seller has assented thereto." To this section there is attached a proviso which develops section 10 of the Factors Act, 1889, and protects against the unpaid seller's right of lien or stoppage *in transitu*, a person who in good faith and for valuable

(a) *Stoveld v. Hughes*, 14 East, 308.

(b) See s. 25 and cf. *Cahn v. Pockett's Bristol Channel Co.*, in 1899, 1 Q. B. at p. 664.

consideration has taken from the buyer or owner of the goods a document of title to the goods, such document of title having been lawfully transferred to the buyer or owner.

Between the original seller and the first buyer an agreement to hold as the buyer's bailee is not probable, for there seems little to induce the seller to consent to abandon his lien. If the seller consents to acts of partial ownership, on the part of the sub-buyer, with whom he has no contract, it affords a fair presumption of an agreement with him to hold the goods as a bailee. If he consents to similar acts by the buyer with whom he already has a contract, the fair presumption is, that the acts are assented to in consequence of the original contract, which remains unchanged. But in either case the seller's rights cease when he has agreed to change the character of his possession, and not before.

In *Owenson v. Morse* (a), in 1796, the plaintiff went into the defendant's shop and agreed to purchase some articles of silver plate, and paid for them in bank-notes. The defendant, in order to have the plaintiff's arms engraved on the goods, employed an engraver and paid him, instructing him to return the goods when done to him, the defendant. The bank failed before the notes were presented, and it was held that there had been no delivery to the plaintiff.

And in *Boulter v. Arnott* (b), in 1823, where the defendant purchased some cigars in the plaintiff's shop and had them packed in his, the defendant's, own boxes; the transaction was for ready money, and the cigars not having been paid for, it was held that there had been no delivery.

Several of the cases decided upon the Statute of Frauds turned upon this distinction, and as they have already been cited in the earlier part of this work, it is unnecessary to cite them here, at length.

In *Hurry v. Mangles* (c), at Nisi Prius, in 1811, before Lord Ellenborough, the facts were, that the defendant Mangles had sold a quantity of oil to Smith, who accepted a

(a) *Owenson v. Morse*, 7 T. R. 64.

(b) *Boulter v. Arnott*, 1 Cr. & Mee. 333.

(c) *Hurry v. Mangles*, 1 Camp. 452.

bill at six months for the price. Mangles received warehouse rent from Smith. Before the bill arrived at maturity, Smith became bankrupt, and then the plaintiff Hurry, who in the interim had bought the oil from Smith, and paid him for it, applied for it and was refused. This seems to have been the first notice that Mangles had of the sub-sale, and as there could, therefore, be no attornment to Hurry, or estoppel, it seems that Hurry stood precisely in the position in which Smith's assignees would have done (see *Dixon v. Yates* (a)), and that the sub-sale was immaterial. The action was in trover. Lord Ellenborough said: "The acceptance of warehouse rent was a complete transfer of the goods to the purchaser. If I pay for a part of a warehouse, so much of it is mine. This is an executed delivery by the seller to the buyer . . . It would be overturning all principles, to allow a man to say, after accepting warehouse rent, the goods are still in my possession, and I will detain them till I am paid. The *transitus* was at an end. The goods were transferred to the person who paid the rent, as much as if they had been removed to his own warehouse, and then deposited under lock and key."

In *Anderson v. Scott* (b), and *Hodgson v. Le Bret* (c), Lord Ellenborough acted on the same principle. In *Elmore v. Stone* (d) and *Carter v. Touissaint* (e), the Common Pleas and King's Bench came to opposite conclusions as to the inference to be drawn from nearly the same facts. In those cases the question was, whether there was an actual receipt under the Statute of Frauds.

In *Miles v. Gorton* (f), in 1834, Gorton had sold hops lying in Gorton's warehouse, to Faux, and rendered him an invoice, stating the goods to be "at rent." Faux subsold part of the hops, which were delivered to the sub-buyers, and then became bankrupt, not having paid any part of the price.

(a) *Dixon v. Yates*, 5 B. & A. 346, *post*, p. 370.

(b) *Anderson v. Scott*, 1 Camp. 235, n.

(c) *Hodgson v. Le Bret*, 1 Camp. 233.

(d) *Elmore v. Stone*, 1 Taunt. 458, *ante*, p. 29.

(e) *Carter v. Touissaint*, 5 B. & A. 855, *ante*, p. 31.

(f) *Miles v. Gorton*, 2 C. & M. 504.

His assignees brought trover against Gorton, for not giving up the portion of the goods which remained in his hands. They relied on *Hurry v. Mangles* (a), as showing there was an executed delivery. The Court of Exchequer decided in favour of the defendant. Bayley, B., said: "I am of opinion that the charge of warehouse rent makes no difference, and I should have thought so if the warehouse rent had been actually paid. In *Hurry v. Mangles* (a) the circumstances were widely different; there the rights of a third party had intervened. He had bought and paid for the goods, and then paid warehouse rent to the vendors; under these circumstances, it was rightly held, that there was a delivery to the sub-vendee on the part of the vendors, who after such receipt of rent from the sub-vendee, must clearly be considered as holding the goods as his agents. Here, in point of fact, the warehouse rent was not actually paid, but only charged, and such charge amounted to a notification by the seller to the purchaser that he was not to have the goods, not only until the payment of the price, but of the rent. In this case, therefore, the vendor had originally a right to hold both for the price and the rent; and I think that the effect is not to make, as has been argued, the warehouse of the vendor the warehouse of the vendee, but to make it a part of the contract between the parties that the goods are not to be delivered until not only the price but the rent is paid."

It is to be observed, that Bayley, B., was under a mistake as to the facts in *Hurry v. Mangles* (a) (at least, those parts of his judgment marked in italics are contradicted by the report of that case in 1 Camp. 452), but the distinction between what he supposes to be *Hurry v. Mangles* (a), and *Miles v. Gorton* (b), is strong and clear, if the receipt of warehouse rent is material only as evidence of the seller's assent to change the capacity in which he holds possession of the goods.

In *Townley v. Crump* (c), in 1835, Crump, the seller of

(a) *Hurry v. Mangles*, 1 Camp. 452.

(b) *Miles v. Gorton*, 2 C. & M. 504.

(c) *Townley v. Crump*, 1 A. & E. 58.

wine, who was also a warehouseman, gave the buyer Wright a note in these terms:—"Mr. B. Wright. We "hold to your order 39 pipes and 1 hhd. red wine, marked "J. C., J. M., No. 41, a. 67.—69 a. 80 pipes, No. 105 hhd. "sent free to 29th November next. J. Crump and Co."

The wine remained in Crump's warehouse. Wright accepted a bill for the price, and then became bankrupt. His assignees brought an action of trover against Crump, for the wine specified in the note. Lord Abinger, at Nisi Prius, seems to have thought the note was like a delivery order or a bill of lading, giving the buyer authority to get the possession, but not equivalent to giving it to him; he reserved the point, and directed a nonsuit, and the Queen's Bench refused to grant the plaintiffs a rule *nisi*.

The Court observed, that "no case had been cited where "the question arose between the original vendor and vendee," so they seem to have acted on the same principle as in the case of *Miles v. Gorton* (a).

In *Grice v. Richardson* (b), in the Privy Council in 1877, the appellants were both sellers and warehousemen. The respondents were the trustees of Webster and Co., the insolvent buyers. The appellants sold tea lying in their warehouse to Webster and Co., and gave them delivery warrants or certificates which stated that the tea was deliverable to Webster and Co. They delivered a portion of the tea, and charged warehouse rent for the whole of it, and they appear to have made a transfer of it into Webster and Co.'s name in the warehouse book. Webster and Co. became insolvent without having paid for the tea. The Court held that the appellants were entitled to retain the tea.

Although this case seems quite consistent with the authorities, Sir Barnes Peacock, in delivering the judgment of the Court, seems to have had present to his mind a distinction as a matter of law, between actual and constructive possession, which it is submitted does not exist.

(a) *Miles v. Gorton*, 2 C. & M. 504, ante, p. 366.

(b) *Grice v. Richardson*, 47 L. J. C. P. 48; 3 App. Ca. 319.

As before mentioned, section 41 (2) of the Act now provides "that the seller may exercise his right of lien notwithstanding "that he is in possession of the goods as agent or bailee (or "custodier) for the buyer." Very commonly goods which are the subject of commerce, are not in the custody of the owner, but of a third party, as a wharfinger, warehouseman, or the like. When such is the case, if the property be transferred by a sale, the seller still retains his rights, until the warehouseman holds the goods for the buyer; and during the interval between the time at which the buyer has acquired authority to call upon the warehouseman to hold the goods for him, and the time when the warehouseman does so hold, the seller's rights are analogous to those which he has whilst the goods are *in transitu*, and it is common to call the goods *in transitu* in such cases. But it is not accurate: the goods are all the time in the possession of the seller, and the question is, whether he had a right to countermand an authority to change that possession, and whether he has exercised such a right whilst he had it.

As a general rule of English law, an authority, at any time before execution, may be revoked by him who gave it; but where the authority is bought for a consideration and coupled with an interest (*a*), it is both transferable and irrevocable. If therefore the buyer be in a position to call upon the seller to deliver him goods, and the seller instead thereof gives him an authority to obtain possession of goods in the custody of a third party, that authority may be transferred by the buyer; and so long as there continues to be a consideration to the seller for granting the authority, it cannot be revoked by the seller. But if such a change of circumstances takes place that the seller would no longer be bound to deliver possession of the goods, then the consideration for giving the authority has failed, and the seller may, if the authority has not been executed, revoke it just as he might then refuse to give it.

It does not seem material whether the authority to take

(a) *Coryton v. Lithebye*, 2 Will. Saund. 365.

possession be merely implied from the contract of sale vesting the right of possession in the buyer, or be given expressly, and it probably does not affect this right whether the authority be in writing or not, though by certain statutes the effect of a written delivery order is considerably enlarged; and it is not material that the authority has been transferred to a third party, who has *bonâ fide* paid the intermediate buyer, if the first seller has done nothing to induce him so to do. The only questions are, whether, at the time the first seller revoked the authority, he was in such a position that he might refuse to deliver, and whether, before the revocation, the authority had been executed; for if any part of the goods have been put in the actual or constructive possession of the buyer or his assigns, the seller's right as to that part is gone (a).

These points seem all to be deducible from *Dixon v. Yates* (b), in 1833, in which the whole law was a good deal discussed. There, Dixon and Co. were owners of a quantity of rum lying in Yates' warehouse. On the 13th August they sold 46 puncheons, specified by marks and numbers, to Collard; Collard on the same day accepted two bills payable at 3 and 4 months for the price. Shortly after the sale, Dixon and Co. gave Collard a delivery order for 2 puncheons, which were accordingly taken away by him; they refused to give him a delivery order for the remaining 44, which were the subject of this action. On the 28th October Collard sold 26 puncheons of the 44 remaining in Yates' warehouse, to Kaye, who paid him for them, but took no possession. On the 7th September (c), Collard sold the remaining 18 puncheons to Bond, and Proctor, who paid for them. Yates, the warehouseman, without any further authority from Dixon and Co., allowed Bond and Proctor to take three of the 18 puncheons away; the other 15 remained as before. On the 16th November Collard was insolvent, and his bill dishonoured, and on the 18th November Dixon and Co. ordered Yates not to deliver any of the 44 puncheons

(a) See Sale of Goods Act, s. 42.

(b) *Dixon v. Yates*, 5 B. & Ad. 313.

(c) ? November.

of the rum, but this order came after Bond and Proctor had, as has been already said, taken away three puncheons. On the 19th November Dixon and Co. demanded the rum from Yates, who refused to deliver it; and on the same day Kaye, Bond, and Proctor presented to Dixon and Co., for their acceptance, delivery orders for the 26 and 15 puncheons respectively, which Dixon and Co. refused to accept. The whole question came before the Court of King's Bench on an interpleader between the four parties: Dixon and Co., the original sellers, Yates the warehouseman, and Kaye, and Bond and Proctor, the sub-buyers. The Court of King's Bench, after a long and learned argument, ordered the 41 puncheons then remaining in Yates' warehouse to be given to Dixon and Co., and the costs of the litigation concerning them to be paid by Kaye, and Bond and Proctor, and discharged Yates, and Bond and Proctor from the claim of Dixon and Co. for the value of the three puncheons delivered to Bond and Proctor, and ordered Dixon and Co. to pay the costs of the litigation concerning them. This was, therefore, a direct decision that the three puncheons were rightfully delivered to Bond and Proctor, though no express authority to deliver possession was given by Dixon and Co. (but rather an attempt made to refuse even that authority implied by the sale on credit), and that the countermand as to these three puncheons was too late; but that it was a proper countermand as regarded the other 41 puncheons, notwithstanding that the sub-buyers had *bona fide* paid their seller, the first buyer, Collard.

The practical dispute in such cases most commonly is, as to whether the authority to take possession was at the time of the countermand already executed or not; for if, before notice of countermand is given to the bailee, the authority is so far acted upon as to put the buyer in actual or constructive possession of the goods, it is no longer in the seller's power to countermand the authority. In the case of *Dixon v. Yates* (a), the sub-buyers had marked, coopered,

(a) *Dixon v. Yates*, 5 B. & Ad. 313.

and gauged the puncheons of rum, and had, as before said, taken complete possession of a part. It was urged that these acts amounted to a taking constructive possession of the whole, but the Court of King's Bench decided that those acts were in themselves equivocal, and were only evidence of a taking of possession—acts which might amount to it if done with that intention. "The taking of samples and coopering," said Lord Denman, "are circumstances from which a jury might infer an actual delivery of the whole. . . . If I had been on the jury in this case, I should have found there was no such delivery." And the other Judges all in more or less in express language said, that the question of whether those acts amounted to taking possession was one of fact, and not of law.

There is a difference to be borne in mind between an absolute authority to take possession, and one that is conditional. Where the authority is absolute, nothing further is requisite to give the buyer possession of the goods than an assent on the part of the bailee to hold them on his account, and such an assent need not be evidenced by any formal act. It is indisputably shown by a formal transfer in the warehouseman's books, but it is as effectual if expressed by word of mouth, or perhaps even if implied by silence under circumstances which make silence indicative of assent.

In *Harman v. Anderson* (a), in 1809, the facts were, that Dudley bought a quantity of butter then lying in the defendant's warehouses. The sellers gave him a delivery order, which he lodged with the warehousemen. He became bankrupt immediately afterwards, and the sellers, who were unpaid, countermanded the authority to give possession, and the warehousemen, in obedience to this countermand, detained the goods; for this detention the assignees of Dudley brought trover against the warehousemen. At Nisi Prius it was taken as proved that the goods were transferred in the warehouse books before the notice of countermand, and Lord Ellenborough said: "The payment of rent in these cases is a

(a) *Harman v. Anderson*, 2 Camp. 243.

“circumstance to show on whose account the goods are held, but it is immaterial here, the transfer in the books being of itself decisive. I am clearly of opinion that the assignees are entitled to recover.”

Afterwards, in banc, the defendants produced affidavits to show that one parcel of the butter was not transferred in the books, and that nothing had ever been done by the warehousemen to indicate assent to the transfer of that parcel; but the Court said it made no difference. Lord Ellenborough said: “After the note was delivered to the wharfingers, they were bound to hold the goods on account of the purchaser. The delivery note was sufficient without any transfer in their books.”

A precisely similar decision was come to by the Common Pleas in *Lucas v. Dorrien* (a), in 1817, but the Court, besides giving the same reasons for their decision, went into a discussion concerning the effect of the delivery order before notice to the warehouseman, a question which did not arise in the case.

When the bailee has notice of those circumstances under which he is, in the language of Lord Ellenborough, in *Harman v. Anderson* (b), “bound to hold the goods for the purchaser,” and is required to hold the goods accordingly, it is pretty clear that mere silence is evidence of acquiescence, and it may be a question whether even an express refusal, if wrongful, would have any effect in preserving the seller's rights. Probably it would, and the question is of the less practical importance as such a refusal would make the bailee liable.

In *Lackington v. Atherton* (c), in 1844, where Atherton, the seller, had given a delivery order in his own name to the buyer, which order, when presented to them, the warehousemen refused to accept on the ground that the goods stood in the name of a former owner, and that they had never been

(a) *Lucas v. Dorrien*, 7 Taunt. 278.

(b) *Harman v. Anderson*, 2 Camp. 243.

(c) *Lackington v. Atherton*, 13 L. J. C. P. 140; 8 Scott, N. S. 38; 7 M. & G. 360.

transferred into the name of Atherton, the buyer became bankrupt, and Atherton, by means of a delivery order from the former owner, obtained possession. The Common Pleas, in an action between Atherton and the assignees of the buyer, decided that this refusal to deliver possession to the buyer, who really was then entitled to the possession, prevented Atherton's rights as unpaid seller from being divested, and that a subsequent countermand on the buyer's insolvency was valid; but in this case the refusal of the bailee was so far justified by circumstances, that it would not have been evidence of a conversion by him. His refusal to assent to the transfer of possession without orders from the person who originally deposited the goods with him was not wrongful, though his mere assent to the transfer would have been sufficient to alter the possession.

In *Tanner v. Scovell* (a), in 1845, Boutcher and Co. sold to M'Laughlin some glue pieces, and after the arrival of the goods at the defendant's wharf, gave him the following order, addressed to the superintendent of the wharf: "Please weigh and deliver to Mr. M'Laughlin 48 bales of glue pieces." On receipt of this, the defendants weighed the bales and communicated the weight to Boutcher and Co., who thereupon sent to M'Laughlin an invoice stating the weight and price.

Subsequently the defendants delivered five of the bales to a buyer from M'Laughlin, on his order. At a later date, in consequence of M'Laughlin's failure to pay Boutcher and Co., they ordered the defendants to deliver no more glue pieces. No transfer of the pieces had been made in the defendant's books from Boutcher and Co. to M'Laughlin, nor was any rent charged to him. The Court upheld a verdict for the defendant.

In *Pearson v. Dawson* (b), in 1858, Askew purchased of the defendant a portion of a cargo of sugar which had been consigned to him, per *Orontes*, giving his ac-

(a) *Tanner v. Scovell*, 14 L. J. Ex. 321; 14 M. & W. 28.

(b) *Pearson v. Dawson*, 27 L. J. Q. B. 248; E. B. & E. 448.

ceptances in payment. Askew sold 20 hogsheads of the sugar to the plaintiffs, who gave their bill in payment, and gave them the following delivery order addressed to the defendant: "Please deliver to Messrs. Pearson and "Hampton, or order, 20 hogsheads of sugar *ex Orontes*. "James Askew." This order was handed to the defendant, who entered the plaintiff's name opposite 20 hogsheads in a book kept by him in which he entered sales and names of buyers. The sugar was lying in the defendant's name at a bonded warehouse of which the custom house officer had one key and the defendant's warehouse keeper the other. The defendant subsequently delivered 8 of the hogsheads to the plaintiffs on their delivery orders. Askew became insolvent before his bills were paid, and the defendant refused delivery of the remainder. It was held by Lord Campbell, C. J., Coleridge, Erle, and Crompton, JJ., that the plaintiffs were entitled to recover the value of the 12 undelivered hogsheads.

But when the authority to give possession is conditional, the case is somewhat different. The bailee is not authorized to give possession, nor the buyer to take it until the conditions are fulfilled. It is not, therefore, to be presumed, or inferred, that the bailee consents to hold the goods for the buyer before these conditions are fulfilled, and though an express unconditional assent on his part might, and probably would, estop him from denying that the possession was in the buyer, yet it may be doubted whether even an actual delivery of possession, without fulfilling the conditions, would affect the seller. But it must be observed that conditions are not necessarily binding, merely because they are expressed in the authority. If by the bargain the buyer is entitled to an unconditional authority to take possession, the seller cannot clog that authority with any conditions at his mere pleasure, and even if the buyer gives his consent to the conditions, that consent is revocable, unless there be some consideration for it. It is therefore necessary, not merely that the authority should be conditional, but that the conditions should be authorized by the contract.

In the case of *Hanson v. Meyer* (a), in 1805, the contract of sale was by Meyer to Wallace and Hawes of a quantity of starch, at 6*l.* per cwt. The seller gave a delivery order to the buyers, addressed to the Bull Porters, in these terms; —“Please to weigh and deliver to Messrs. Wallace and “Hawes, all my starch.” The warehouseman received the order, and so far obeyed it as to weigh and deliver a part of the starch; then Wallace and Hawes became bankrupt, and the order was countermanded, and the starch taken away by Meyer. The assignees of Wallace and Hawes brought trover against Meyer. It is now decided that by such a bargain the property is not changed (b), but at that time it was not so settled, and *Hanson v. Meyer* did not decide that point. The case was decided on the ground that the authority to give possession was conditional only. Lord Ellenborough said: “By the terms of the bargain formed by the brokers of the “bankrupt, two things in the nature of conditions, or preliminary acts on their part, necessarily preceded the absolute “vesting in them of the property contracted for. . . . The “second, which is the act of weighing, does so in consequence “of the particular terms of this contract, by which the price “is made to depend upon the weight. The weight therefore “must be ascertained, in order that the price may be known “and paid, and unless the weighing precede the delivery, it “can never for these purposes effectually take place at all. “. . . This preliminary act of weighing, it certainly never “was in the contemplation of the sellers to waive in respect “of any part of the commodity contracted for. The order to “the Bull Porters, his agents, is to weigh and deliver all his “starch. Till it was weighed, they, as his agents, were not “authorized to deliver it, still less were the buyers themselves, or the present plaintiffs their assignees, authorized “to take it by their own act from the Bull Porters warehouse, “and if they could not so take it, neither can they maintain “this action of trover. . . . It is unnecessary to consider

(a) *Hanson v. Meyer*, 6 East, 614.

(b) *Ante*, p. 186 *et seq.*

“ what would have been the effect of non-payment of the
“ price, or the right to the undelivered residue of the starch
“ if the case had stood merely on that ground, as it did in the
“ case of *Hammond and others v. Anderson* (a), where the
“ bacon sold in that case was sold for a certain fixed price,
“ and where the weighing mentioned in that case was merely
“ for the buyer’s own satisfaction, and formed no ingredient
“ in the contract between him and the seller, though it formed
“ a very important circumstance in the case, being an un-
“ equivocal act of possession and ownership, as to the whole
“ quantity sold on the part of the buyer.”

The circumstance of the weighing being *by the contract* to precede the delivery, distinguishes this case and the cases which follow it (b), viz., *Wallace v. Breeds* (c), *Busk v. Davis* (d), and *Shepley v. Davis* (e), from the case of *Swanwick v. Sothern*, in 1839. In *Swanwick v. Sothern* (f) the sellers of corn had given the buyer a delivery order in the following terms:—
“ Deliver Mr. J. Marsden 1028 $\frac{1}{4}$ $\frac{2}{5}$ bushels of oats, Bin 40,
“ O. W., and you will please weigh them over and charge us
“ the expense.” The warehousemen entered this order in their book. The Queen’s Bench came to the conclusion that the contract of sale, which was not distinctly proved, was a sale of the bin of oats for a certain sum, and that the weighing of the oats was not a part of the contract; and that, therefore, the transfer in the books defeated the seller’s rights. It seems impossible to doubt that the delivery order was as conditional as that in *Hanson v. Meyer* (g), but there the condition was a binding one as part of the bargain; in *Swanwick v. Sothern* (f), it was not binding on the purchaser, and he chose to waive it.

In *Godts v. Rose* (h), in 1855, the seller, who was the plaintiff, contracted to sell oil to the defendant, to be “ free

(a) *Hammond v. Anderson*, 1 N. R. 69.

(b) *Ante*, pp. 133, 189.

(c) *Wallace v. Breeds*, 13 East, 522.

(d) *Busk v. Davis*, 2 M. & S. 396.

(e) *Shepley v. Davis*, 5 Taunt. 617.

(f) *Swanwick v. Sothern*, 9 A. & E. 895.

(g) *Hanson v. Meyer*, 6 East, 614.

(h) *Godts v. Rose*, 25 L. J. C. P. 61; 17 C. B. 229.

“delivered and paid for in 14 days by cash.” The plaintiff then gave the wharfinger authority to transfer certain casks of oil into the defendant’s name, and received from the wharfinger a notice addressed to the defendant, in which the wharfinger stated that he had transferred the oil into the defendant’s name. The plaintiff then sent a clerk to the defendant with the notice, an invoice, and a receipt for the price, with directions to exchange them for a cheque. The defendant obtained possession of the wharfinger’s notice of transfer, but refused to give a cheque on the ground that payment was to be made in 14 days. The clerk then went to the wharfinger and countermanded the order. Subsequently however, the wharfinger delivered the oil to the defendant, thinking that the property had passed to him. The Court, consisting of Jervis, C. J., Williams, Crowder and Willes JJ., held the meaning of the contract to be, that the seller might deliver the oil at any time within 14 days, and might at the time of delivery require payment, and as the jury had found that the clerk had no intention to part with the property, the plaintiff was entitled to recover.

In *Cooper v. Bill* (a), in 1865, timber lying on a wharf had been sold by the defendants to Gurney, whose agent measured the timber, numbered each tree, and marked it with Gurney’s initials, and then proceeded to square the timber. On the insolvency of Gurney, the defendants removed the timber to a field in their occupation, and declined to give it up to the plaintiffs, Gurney’s assignees. But the Court held that there had been a delivery of the goods to the buyer.

We shall now return to the subject of stoppage *in transitu*, properly so called, to which this digression is by no means irrelevant.

The *transitus*, as its name imports, is whilst the goods are on their passage from the seller to the buyer, or, as has been already said, when they are in the hands of one who neither holds the possession by a contract of bailment made

(a) *Cooper v. Bill*, 34 L. J. Ex. 161; 3 H. & C. 722.

with the seller, nor yet as an agent to hold them under the order of the buyer, but only as an agent to forward them from the seller to the buyer. As Baron Rolfe said in the case of *Gibson v. Carruthers* (a), the essence of the doctrine of stoppage *in transitu* is that "the goods should be in the custody of some third person, intermediate between the seller who has parted with and the buyer who has not yet acquired actual possession."

By section 45 (1) of the Sale of Goods Act, "Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier."

There are many cases in which it is quite clear in which capacity the goods are held. No one could for a moment doubt that goods in the hands of a public carrier, either by land or by water, and actually on the journey, are *in transitu*; it is self-evident as a matter of fact, that the carrier under such circumstances holds them merely as an agent to forward. And it is equally clear that goods travelling on the same journey in the buyer's own cart or barge, which he had sent for them, are not *in transitu*; for the carter or bargeman is clearly the buyer's servant, and not an agent to forward from the seller. But there is sometimes a good deal of difficulty in drawing the boundary line between the carrier and the servant, as, for instance, in ascertaining the character of the captain, where the buyer does not send his own vessel to fetch the goods, but employs a ship belonging to a third party on that particular errand. In two important cases, *Inglis v. Usherwood* (b), in 1801, and *Bohtlingk v. Inglis* (c), in 1803, it was at first taken for granted, that a delivery of goods on board a vessel chartered by the buyer, was a

(a) *Gibson v. Carruthers*, in 1841; 11 L. J. Ex. 138; 8 M. & W. 328. See also *Schotman v. Lancs. and Yorks. Ry. Co.*, in 1867, 36 L. J. Ch. 361; 2 Ch. App. 335.

(b) *Inglis v. Usherwood*, 1 East, 515.

(c) *Bohtlingk v. Inglis*, 3 East, 381.

delivery to the buyer himself, but afterwards the Court held and decided that it was but a delivery to an agent to forward, and that the goods on board the ship were *in transitu*. How this may be, seems to depend on the nature of the contract between the shipowner and the charterer, and by section 45 (5) of the Sale of Goods Act, "When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent to the buyer."

In the majority of cases, the shipowner does not part with the possession of the vessel to the charterer; he does no more than contract to employ the vessel and the services of the master and crew for a time, exclusively for the benefit of the charterer; so that the master remains the servant of the shipowner, and not of the charterer, and his possession is the possession of the shipowner, and not of the charterer in any case in which their rights come in question. But though this is the usual contract between the shipowner and the charterer, they may in law, and in practice sometimes do, agree that the charterer shall during the voyage have the possession of the vessel, and that the master shall during that time be the servant of the charterer. In other words, though a charter-party usually is a contract on the part of the shipowner to use the ship and the services of the master and crew in a particular manner, it may amount to a demise of the vessel, and of the services of the master and crew. The distinctions on which it depends, which is the construction of the charter-party, may be found in Abbott on Shipping (a).

When, therefore, goods are put into the possession of the master of a ship, they are in general in the possession of the shipowner, who, as it is evident, is an agent to forward the goods, and therefore goods on shipboard in general are *in transitu*; but where the master is not the servant of the shipowner, but the immediate servant of the charterer, the goods, by being put into possession of the master, are put in the

(a) Abbott on Shipping, Part III., Chap. IX.

possession of the charterer, and, therefore, if the charterer be also the buyer, they are no longer *in transitu*. "So," says Lord Tenterden in *Abbott on Shipping* (a), "as I have before observed, the master of a ship chartered wholly by the consignee is now held to be a carrier, in whose hands goods may be stopped (b). But where a ship had been hired by the consignee for a term of years, and was fitted out, victualled, and manned by him, and goods were put on board thereof to be sent by him on a mercantile adventure, for which he had bought them, it was held that the consignor could not stop them: the consignee being in that case the owner of the ship *pro tempore*, and the delivery of goods on board thereof being equivalent to a delivery into a warehouse belonging to him, and the transit being in effect a transit from, and not to him. *Fowler v. MacTaggart* (c)."

It is not of any importance in point of law whether the goods are actually on a journey or not, for if the goods are deposited with one who holds them merely as an agent to forward, and has the custody as such, they are as much *in transitu* as if they were actually moving; but in general there is more difficulty in ascertaining as a fact in what capacity goods are deposited, than in what capacity they are carried. The acts accompanying the transport of goods are less equivocal, less susceptible of two interpretations as to the character in which they are done, than are those accompanying a deposit of goods. The question, however, is still the same; has the person who has the custody of the goods got possession as an agent to forward from the seller to the buyer, or as an agent to hold for the buyer?

In *Bethell v. Clark* (d) in 1888, Lord Esher, M. R. said:

(a) *Abbott on Shipping*, Part III., Chap. IX., 14th ed., p. 834.

(b) *Bohtlingk v. Inglis*, 3 East, 381; *Berndtson v. Strang*, 37 L. J. Ch. 665; 3 Ch. Ap. 590; but see also *Cowdenbeath Coal Co. v. Clydesdale Bank*, 22 Scss. Cas. (4th) 682.

(c) Cited in 7 T. R. 442.

(d) *Bethell v. Clark*, 57 L. J. Q. B. 302; 20 Q. B. D. 615; See also *Jobson v. Eppenheim*, 21 T. L. R. 468.

“There has been a difficulty in some cases where the question was whether the original transit was at an end, and a fresh transit had begun. The way in which that question had been dealt with is this: Where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists; but, if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are *in transitu* afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So also if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at an end when they have reached that place, and any further transit is a fresh and independent transit.”

In *Leeds v. Wright* (a), in 1803, where an agent of the bankrupt purchased the goods on account of the bankrupt for exportation, but had authority from the bankrupt to export them to any port he pleased, the Court of Common Pleas held that he was not an agent to forward, and that goods in his hands were not *in transitu*. And in *Scott v. Pettit* (b), in the same year, where the bankrupt had given general orders to a carrier to send all goods for him to the defendant's house to be packed, and the goods were accordingly sent to his house, the same Court decided that there being no fixed ulterior destination, the packer must be considered not as an agent to forward, but as one to hold the goods subject to the buyer's orders, like a warehouseman, and, consequently, that on their delivery to the defendant the *transitus* was ended. Shortly after the decision of these cases, the point arose in *Dixon v. Baldwin* (c), in 1804, in which case goods were ordered by the insolvents “to be forwarded to Metcalfe at

(a) *Leeds v. Wright*, 3 B. & P. 320.

(b) *Scott v. Pettit*, 3 B. & P. 469.

(c) *Dixon v. Baldwin*, 5 East, 175.

"Hull, to be shipped for Hamburg as usual," and it was proved that it was usual for Metcalfe to keep such goods till he received orders from the insolvents, and then to do with them whatever the insolvents ordered. The King's Bench decided that the goods in Metcalfe's hands were not *in transitu*. Lord Ellenborough reviewed most of the previous cases, and approved of the principle of *Scott v. Pettit* (a), which he said was, "that the *transitus* of goods is only not at an end on "their reaching the packer, where they remain with him for "the purpose of being forwarded on to some ulterior appointed place of destination; but here, as in those cases, "the goods had so far gotten to the end of their journey, "that they waited for new orders from the purchaser to put "them again in motion, and that without such orders they "would continue stationary." Grose, J., differed from the rest of the Court upon this point, and thought the *transitus* at an end; but all four Judges agreed upon another point, which decided the cause.

It is worth while to observe, that the marginal note in East's Reports is not a correct abstract of what was really decided. The marginal note states the case to be, that goods "sent to Metcalfe to be forwarded to Hamburg" were not *in transitu*; but Lord Ellenborough's judgment proceeds on the express ground that it was proved that the goods were sent to Metcalfe, *not* to be forwarded to Hamburg, but to wait for orders from the buyer (b).

In *Smith v. Goss* (c), in 1808, at Nisi Prius, Lord Ellenborough decided that where goods had been ordered "to be "sent addressed to the care of Goss, Bull's Wharf, London, "with directions to send them by the first vessel to Newcastle," they were *in transitu* in Goss's hands.

And in *Coates v. Railton* (d), in 1827, where the course of business was for Railton, who was a packer, warehouseman,

(a) *Scott v. Pettit*, 3 B. & P. 469.

(b) *Dodson v. Wentworth*, 4 M. & G. 1080, in 1842; *Wentworth v. Outhwaite*, 10 M. & W. 436, in 1842; 12 L. J. Ex. 172.

(c) *Smith v. Goss*, 1 Camp. 282.

(d) *Coates v. Railton*, 6 B. & C. 422.

and commission agent at Manchester, to purchase goods in the name of Butler, of London, and send them to a branch of that house at Lisbon, and the goods which were so ordered were delivered at Railton's warehouse, the King's Bench considered that Railton had held the custody merely as one step in the *transitus* to Lisbon. These cases are, it will be observed, quite in accordance with Lord Ellenborough's judgment in *Dixon v. Baldwin* (a), though opposed to the marginal note in that case (b).

In *Tucker v. Humphrey* (c), in 1828, flour was shipped to the wharf of the defendant, who was in the habit of storing flour in his warehouses for the buyer. The seller stopped the flour before it had been landed, while the vessel was lying alongside the wharf, and the stoppage was held good.

In *Jackson v. Nichol* (d), in 1839, it was proved that Crawhall, an agent of the insolvents, who purchased goods for them at Newcastle, was in general in the habit of receiving the goods into his possession to abide the insolvents' orders. In this particular instance, however, before the goods were out of the seller's possession, the insolvents had directed Crawhall to forward the goods to them in London. The sellers then gave a delivery order to Crawhall, who indorsed it to a wharfinger with a special indorsement "to go on board the *Esk*." The wharfinger handed the order to a keelman, who got the goods and put them on board the *Esk*. The *Esk* sailed for London, and moored in the Thames. The defendants, who were wharfingers, received the goods on board a lighter, and then they were stopped by the plaintiffs, who were unpaid sellers; and the Court held that the goods were still *in transitu*, because every step taken was but "a link in the chain of the machinery, by which the goods were to be put in motion." Tindal, J., said, "that if the

(a) *Dixon v. Baldwin*, 5 East, 175.

(b) See remarks of Brett, L. J., on this case in *Kendal v. Marshall, Stevens and Co.*, 52 L. J. Q. B. 313; 11 Q. B. D. 366.

(c) *Tucker v. Humphrey*, 4 Bing. 516. See also *Rodger v. Comptoir d'Escompte de Paris*, 38 L. J. P. C. 30; L. R. 2 P. C. 393.

(d) *Jackson v. Nichol*, 5 Bing. N. C. 508. Cf. *Cooper v. Bill*, 34 L. J. Ex. 161, *ante*, p. 378.

“goods had ever come into the possession of Crawhall as the
“agent of the buyers, there to remain till the agent received
“orders for their ulterior destination, such possession would
“have been the constructive possession of the buyers themselves
“and the right to stop *in transitu* would have been at an end.”

In *Valpy v. Gibson (a)*, in 1847, a case resembling *Dixon v. Baldwin (b)*, goods had been sent by the defendants, the sellers, at the request of Brown, the buyer, to Leech and Co., of Liverpool. The report is not by any means clear as to what was the precise nature of the relationship of Leech and Co. to Brown, but they appear to have been employed by him prior to this transaction to forward goods to Valparaiso, but not to have received instructions from him to forward the goods in question.

Leech and Co. received the goods from the defendants, together with a letter stating that they were for shipment to Valparaiso, and Leech and Co. had them put on board, and subsequently relanded them by order of Brown and returned them to the sellers to be repacked. Brown became insolvent without having paid for the goods, and the sellers asserted a right to retain them until payment had been made. The plaintiffs were Brown's assignees. Wilde, C. J., delivering the judgment of the Court for the plaintiffs, said, “that
“although the defendants knew that the goods were to be
“sent to Valparaiso, and so informed Leech and Co., yet
“Leech and Co. could not forward the goods simply on that
“information, but held them subject to such orders as the
“buyer might give, and the *transitus* was consequently at an
“end as soon as the goods came to their hands. And further,
“that independently of this Brown had, by relanding the
“goods, dealt with them as owner, and that alone was
“sufficient to put an end to the *transitus (c)*.”

In *Bethell v. Clark (d)*, in 1888, goods had been sold by Clark and Co., of Wolverhampton, to Tickle and Co., of

(a) *Valpy v. Gibson*, 4 C. B. 837.

(b) *Dixon v. Baldwin*, 5 East, 175.

(c) See also *Foster v. Frampton*, 6 B. & C. 107.

(d) *Bethell v. Clark*, 57 L. J. Q. B. 302; 20 Q. B. D. 615.

London, and the sellers were instructed to consign the goods "to the *Darling Downs*, to Melbourne, loading in the East "India Docks." The sellers delivered the goods to the London and North Western Railway Company to be forwarded to the ship, and they were accordingly sent by railway to Poplar, and from there to the ship in lighters by a lighter company, as agents of the railway company, a mate's receipt being taken for them on shipment, which was forwarded to the buyers. On being informed of the insolvency of the buyers, the sellers gave notice to the railway company to stop the delivery of the goods on board the ship, and the railway company gave a similar notice to the lighter company. *Held*, that the transit was not at an end until the goods reached Melbourne, and therefore that the sellers had till then a right to stop them *in transitu*.

In *Lyons v. Hoffnung (a)*, in 1890, Clare bought goods from Hoffnung and Co., and gave instructions for the packages to be marked $\frac{W}{K}C$ —that is, William Clare, Kimberley—and to be sent to Howard Smith and Co.'s wharf in Sydney, for shipment to Kimberley. He told the sellers that he was going with the goods. The goods were sent to Howard Smith and Co.'s wharf to be shipped by one of their ships, and in the documents Hoffnung and Co. were described as the shippers of the goods, Clare as the consignee, and the place of destination as Kimberley. Clare obtained a bill of lading for the goods. It was held that the sellers had the right to stop the goods on the voyage.

In cases of stoppage *in transitu* the question is, not whether the property has or has not passed, for even if it has passed the seller may have the right to retake the goods, but in what capacity did the captain receive the goods, whether as the servant of the buyer or as an agent to carry.

In the following cases it was argued that the goods had necessarily been delivered to the buyer, because they had been placed on board his ship or a ship chartered by him.

In the case of *Van Casteel v. Booker (b)*, in 1848, Barton

(a) *Lyons v. Hoffnung*, 59 L. J. P. C. 79; 15 A. C. 391.

(b) *Van Casteel v. Booker*, 18 L. J. Ex. 9; 2 Ex. 691.

and Co., of Liverpool, sent their own ship laden with coals to Lyon, Schwind and Co. at Rio, who sold the coals and, partly with the proceeds but mainly with their own funds, purchased coffee, which they put on board the same ship, sending an invoice to Barton and Co., in which the coffee was stated to have been shipped by order for account and at the risk of Barton and Co. On the back of the invoice was an account in which they credited themselves with the invoice price of the coffee and debited themselves with the proceeds of the coal, and they drew on Barton and Co. for the balance. They took the bill of lading deliverable to order or assigns, "he or they paying freight *free*" (the word "free" was inserted in writing into a printed form), and sent it indorsed in blank to Barton and Co. Barton and Co. were heavily indebted to their bankers, and had been threatened by them with certain proceedings. These facts came to the knowledge of Lyon, who was the Liverpool agent of Lyon, Schwind and Co. He pressed Barton and Co., and they agreed that when the bills of lading came to hand they should be given to Haynes Higginson to hold them to the order of Lyon as security against the bills of exchange drawn against the coffee. On the 11th of November Barton and Co. became bankrupt. The bill of lading arrived on the 12th, and, pursuant to the agreement, was delivered by Barton and Co. to Haynes Higginson, who handed it to Lyon, and he pledged it with the plaintiffs. When the cargo arrived it was taken possession of by a messenger from the defendants, who were the assignees of Barton and Co., and the captain was served with two notices, one from the plaintiffs claiming the cargo as indorsees of the bill of lading, and the other from Lyon, who claimed to stop the goods *in transitu* as the agent of the unpaid sellers. Lyon appears to have been acting in this on the plaintiff's behalf.

Baron Rolfe told the jury that there could be no right to stop *in transitu*, as delivery on board the consignee's own ship amounted to a taking possession.

On granting a new trial, Parke, B., delivering the considered judgment of the Court, pointed out that the form of

the bill of lading was not conclusive to restrain the effect of delivery on board the consignee's own vessel.

He said: "The contract for carriage, which the bill of lading is, is made expressly with the consignor, and he no doubt might sue upon it, though in making it he was really acting as agent of, and for, the consignee. But if he made it as agent for and on behalf of the consignee, the consignee also, as being the real principal, might sue, if there had been a breach of the contract to carry. Notwithstanding the form of the bill of lading, therefore, the contract may have been made really on behalf of the vendee, though *prima facie* it is made on behalf of the vendor; and it is a question for the jury, to be decided on the evidence, looking at the form of the bill of lading, particularly noticing that it is made freight free, and the language of the invoice, and the immediate transfer of the bill of lading to the bankrupts, and other facts, whether the goods were not really delivered on board to be carried for and on account and at the risk of the bankrupts."

In the case of *Schotsman v. Lancashire and Yorkshire Railway Co. (a)*, in 1867, Lord Chelmsford, L. C., said that the delivery in the buyer's own ship is a final delivery at the place of destination unless the seller restrains the effect of such delivery. In this case the goods were delivered on board a vessel belonging to the consignee, and the bills of lading had been taken making the goods deliverable to the consignee or assigns. It was admitted that the property had passed to the consignee, and the question was, was there a delivery? It was held that there was.

Berndtson v. Strang (b), in 1868, was a case in which timber in Sweden had been delivered on board a vessel chartered to the buyers. The bill of lading was indorsed and handed over to the buyers in exchange for their acceptance. The buyers insured the timber. On their

(a) *Schotsman v. Lancs. and Yorks. Ry. Co.*, 2 Ch. Ap. 337, in 1867; 36 L. J. Ch. 361; reversed on another point, L. R. 2 Ch. 332.

(b) *Berndtson v. Strang*, 37 L. J. Ch. 665; L. R. 4 Eq. 481; 3 Ch. App. 588.

insolvency the goods were stopped *in transitu* when the ship arrived in England. Lord Cairns, L. C., said this was a charter of an ordinary kind which did not make the buyers, even for a time, the owners or hirers of the ship, but merely operated as by way of contract with the owners of the ship, that they would carry timber to a particular port, and that the timber was in the custody of a person intermediate between the seller who had parted with it, and the buyer who had not obtained actual possession; and held that the stoppage was good. This case was followed in the case of *Ex parte Rosevear China Clay Co., In re Cock (a)*, in 1879, where the facts were very similar.

In *Kemp v. Ismay, Imrie and Co. (b)*, in 1909, Wincott, Cooper and Co., who were commission agents, received instructions to buy certain goods on commission. They made contracts with six sellers at Manchester for the purchase of the goods, and so far as the sellers were concerned they were the principals, the real principals, who were the buyers in Australia, being undisclosed. The property in the goods passed on delivery to the carrier at Manchester. Wincott, Cooper and Co. instructed the sellers to mark the goods "N.X.Z. Adelaide," and forward them to Liverpool to the order of the defendants, who were forwarding agents, for shipment per the steamship *Suevic*. On 1st January, 1908, Wincott, Cooper and Co. advised the defendants that they had instructed the sellers to forward the goods for shipment per the *Suevic*, and directed them to include all the parcels in one bill of lading deliverable to the order of Wincott, Cooper and Co. at Adelaide. On the 11th January the goods were delivered on board, and on the 18th the ship sailed. On the 15th January, Wincott, Cooper and Co. became insolvent, and the sellers stopped the goods *in transitu*. The trustee in bankruptcy of Wincott, Cooper and Co. brought an action to recover from the defendants the value of the goods.

Held, by Lord Alverstone, C. J., that the action could not

(a) *Ex parte Rosevear China Clay Co.*, 48 L. J. Bank. 100; 11 Ch. D. 560.

(b) *Kemp v. Ismay, Imrie and Co.*, 100 L. T. Rep. 996.

be maintained, as the seller's right to stop *in transitu* was not determined by a receipt of the goods by the defendants at Liverpool.

In *Fraser v. Witt* (a), in 1868, a cargo was consigned from Bahia to a firm in Glasgow; the bill of lading stated that the ship was "bound for Falmouth, Cowes, or Queenstown for "orders." When the ship arrived at Falmouth the master asked the consignor's agents in London for orders: they applied to the Glasgow firm for instructions as to the destination of the ship; but before they received them the Glasgow firm became insolvent, and the goods were stopped. Lord Romilly, M. R., held that there had been no constructive delivery, and that the stoppage was good.

In *Ex parte Gibbs* (b), in 1875, the course of dealing between the sellers in America and Whitworth and Co. of Halifax was as follows. Cotton was consigned by the sellers to Brown and Co., their agents in Liverpool, to whom they forwarded the bill of lading together with a bill of exchange drawn on Whitworth and Co. When Whitworth and Co. had accepted the bill they received the bill of lading from Brown and Co., and having indorsed it, sent it to the manager of the Lancashire and Yorkshire Railway Co. at Liverpool. The railway company then paid the freight, got possession of the cotton, and forwarded it from Liverpool to a station near Halifax, where it was put into a siding adjoining Whitworth and Co.'s works. It was held by Bacon, V.-C., that the *transitus* was at an end at Liverpool, when the cotton was delivered to the buyer's agent.

In *Ex parte Watson* (c), in the Court of Appeal, in 1877, Watson and Love agreed that Watson should send goods to Rothwell and Co., of Shanghai, for sale, and draw on Love for the price. Watson employed Copperthwaite, a packer at Bradford, to pack the goods and forward them to London for shipment. Copperthwaite wrote to Love that he was waiting

(a) *Fraser v. Witt*, L. R. 7 Eq. 64.

(b) *Ex parte Gibbs*, 45 L. J. Bank. 10; 1 Ch. D. 101.

(c) *Ex parte Watson*, 46 L. J. Bank. 97; 5 Ch. D. 35. See also *Ex parte Miles*, *In re Isaacs*, 15 Q. B. D. 39.

for forwarding instructions. Love gave him instructions to send them on board the *Gordon Castle* loading in the Thames for Shanghai, and the goods were forwarded by rail to London, marked "Shanghai." The railway company then advised Love that the goods were lying at one of their London stations, and asked for instructions. The goods were put on board the *Gordon Castle*, and bills of lading made out to the order of Love or his assigns, but remained in the possession of the shipowners until Love became bankrupt. It was held by James, Baggallay, and Bramwell, L. JJ., that the *transitus* continued from Bradford to Shanghai.

In *Ex parte Barrow* (a), in 1877, goods sent from London to Falmouth by ship were delivered on the quay at Falmouth and taken to the warehouse of Carne, who acted as the shipping company's agent to receive the goods. Carne's course of business was to let the consignee know that the goods were lying in his warehouse at the consignee's risk, and would be delivered on payment of freight and charges. In this case when the goods were landed, the buyer had absconded, and Carne therefore gave no notice. Bacon, V.-C., held that Carne had never become the buyer's agent to hold the goods for him, and the *transitus* was not at an end.

In *Ex parte Cooper* (b), in 1879, in the Court of Appeal, a cargo of iron castings was consigned by the sellers in Scotland in a vessel chartered by them, to McLaren and Co. in London. McLaren was a partner in both the Scotch and English firms. When part of the goods had been placed on board a barge belonging to the English firm, McLaren, who was in Scotland and knew of the insolvency of both firms, sent a telegram to the manager of the English firm to stop unloading. At this time the Scotch firm was considerably in debt to the London firm. It was argued for the trustee of the London firm that the notice of stoppage *in transitu* should have been given to the master of the ship, and that the stoppage amounted to a fraudulent preference of the Scotch

(a) *Ex parte Barrow*, 46 L. J. Bank. 71; 6 Ch. D. 783.

(b) *Ex parte Cooper*, 11 Ch. D. 68.

firm, and that the delivery of part of the cargo operated as delivery of the whole. But it was held by James, Brett, and Cotton, L. JJ., that the stoppage was good.

In *Ex parte Golding, Davis and Co. (a)*, in 1880, Golding and Co. sold caustic soda to Knight and Sons, to be delivered in monthly quantities, "shipment f.o.b. Liverpool. Price "14l. per ton," and received instructions from them to ship the soda at Liverpool on board the *Larnaca*, for New York. Golding and Co. followed the instructions, and the bills of lading making the soda deliverable at New York to Taylor and Sons (to whom Knight and Sons had re-sold it), were sent to Knight and Sons. Golding and Co. heard of Knight and Sons' insolvency and stopped the soda before the *Larnaca* sailed. The Court of Appeal held that the stoppage was good. The letters f.o.b. merely determine that the cost of shipment shall fall on the seller.

In *Ex parte Falk (b)*, in 1880, where salt was consigned to Calcutta, the seller served a notice of stoppage *in transitu* on the shipowners in Liverpool, and they telegraphed to Calcutta. A day or two later the seller telegraphed to Calcutta to stop the salt. Bramwell, L. J., seems to have been of opinion that the shipowners were not under any obligation to stop the goods, and that there was no good stoppage under the circumstances until the seller himself telegraphed. But in the House of Lords, Lord Blackburn took a contrary view (c).

Kendal v. Marshall, Stevens and Co. (d), in the Court of Appeal, in 1883, shows how extremely difficult it is to determine at what point the *transitus* ends. Leoffler verbally contracted with Ward and Son of Bolton to purchase cotton waste. Nothing was said as to the place of delivery. Leoffler then arranged with Marshall, Stevens and Co., shipowners, that the goods should be sent to them at Garston and for-

(a) *Ex parte Golding, Davis and Co.*, 13 Ch. D. 628. See also *Ex parte Rosevear China Clay Co.*, 48 L. J. Bank. 100; 11 Ch. D. 560.

(b) *Ex parte Falk*, 14 Ch. D. 446, *post*, p. 440, where the facts are set out at some length.

(c) *Kemp v. Falk*, 7 App. Ca. 585.

(d) *Kendal v. Marshall, Stevens and Co.*, 52 L. J. Q. B. 313; 11 Q. B. D. 351.

warded to Rouen. When the goods were ready, Ward and Son asked Leoffler where they should send them. Leoffler replied: "Send them to Marshall, Stevens and Co., Garston;" and on the same day he directed Marshall, Stevens and Co. to forward them to Rouen. Ward and Son delivered the goods to the London and North Western Railway Co. at Bolton to be forwarded to Marshall, Stevens and Co. at Garston. A day or two afterwards the railway company gave notice to Marshall, Stevens and Co. that the goods had arrived, and that if delivery were not taken in due course, the railway company would hold them as warehousemen and charge rent. The goods remained in the goods shed for some days, and on the insolvency of Leoffler were stopped by Ward and Co. Leoffler's assignee claimed them. Matthew, J., held that the *transitus* was not at an end, but the Court of Appeal, consisting of Brett, Cotton, and Bowen, L. JJ., took the opposite view. The facts that Leoffler had never directed Ward and Co. to send the goods to Rouen, nor to deliver them to Marshall, Stevens and Co. in order to be forwarded to Rouen, seem to have had very great weight with the Court of Appeal (a): as Lord Justice Bowen put it, it was no part of the bargain between the seller and the buyer that the transit should last up to a certain time.

In *Taylor v. Great Eastern Railway Co. (b)*, in 1901, Barnard Brothers sold to one Sanders, a corn merchant, a quantity of barley "on rail" at a named railway station to Sanders' order. Barnard Brothers gave the railway company a written order directing them to transfer the goods to "await the order of Sanders." The goods having arrived at the station, the company sent an advice note to Sanders stating that the goods awaited his orders and were held by them, not as common carriers, but as warehousemen at owner's sole risk. Sanders neither acknowledged the receipt of the advice

(a) See also *Ex parte Miles, In re Isaacs*, 15 Q. B. D. 39.

(b) *Taylor v. Great Eastern Ry. Co.*, 6 Com. Cas. 121. It was also held in this case that the attempt by Sanders to resell the goods was evidence of an act done by him in relation to the goods which recognised a pre-existing contract of sale to him by Barnard Brothers, and that Sanders had accepted the goods within the meaning of section 4 of the Sale of Goods Act.

note nor did he inspect the goods, but he endeavoured, without success, to resell the goods by means of a sample which had been supplied to him by Barnard Brothers. Sanders having committed an act of bankruptcy, and not having paid Barnard Brothers, the latter stopped delivery, and the company redelivered the goods to them. In an action by the plaintiff, as trustee in the bankruptcy of Sanders, against the railway company for damages for conversion, it was held, by Bigham, J., that the transit was at an end, and that the company were liable in damages for conversion.

Those cases decided under the Statute of Frauds^(a) as to what amounts to an actual receipt may have some bearing on this subject. They are not cases of stoppage *in transitu*, but are authorities to show under what circumstances the goods have been held to have been delivered to the buyer.

In none of these cases of stoppage *in transitu*, it may be observed, was there any doubt as to the law; the question was one of fact, viz., in what capacity did the different agents hold possession, whether as agent to forward, or as agent to hold for the buyer? This question becomes still more difficult to answer where the party holding the goods acts in two capacities, as, for instance, a carrier, who also acts as a warehouseman, and who may, therefore, have goods in his warehouse either as a place of deposit connected with the carriage, or as a place of deposit subject to the orders of the buyer; or a wharfinger, who sometimes receives the goods as agent to the shipowner and sometimes as agent to the consignee. In all such cases as the leading fact, viz., the possession of the goods, is in itself ambiguous, it is necessary to gather the intention of the parties from their minor acts.

As was before stated, if the possessor of the goods has the intention to hold them for the buyer, and not as an agent to forward, and the buyer intends the possessor so to hold them for him, the *transitus* is at an end; but it is apprehended that both these intents must concur, and that neither can the carrier of his own will convert himself into a warehouseman,

(a) *Ante*, p. 26.

so as to terminate the *transitus*, without the agreeing mind of the buyer : *James v. Griffin* (a), nor can the buyer change the capacity in which the carrier holds possession without his assent, at least until the carrier has no right whatsoever to retain possession against the buyer : *Jackson v. Nichol* (b).

These principles are adopted by the Sale of Goods Act, which enacts in section 45 :—

“(3.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee (or custodier) acknowledges to the buyer or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

“(4.) If the goods are rejected by the buyer, and the carrier or other bailee (or custodier) continues in possession of them, the transit is not deemed to be at end, even if the seller has refused to receive them back.”

In *Rowe v. Pickford* (c), in 1817, a trader in London was in the habit of purchasing goods at Manchester, and of exporting them to the Continent soon after their arrival in London. He had no warehouse in London, and the goods consigned to him usually remained in the waggon office of the defendants, who were carriers, until they were removed for the purpose of being shipped. A parcel of goods lying at the office at the time of the buyer's bankruptcy was held to be no longer *in transitu*.

And this is more clearly the case where the buyer has dealt with the goods lying in the carrier's warehouse as his own (d).

In *James v. Griffin* (a), in 1837, the bankrupt had often used Beale's wharf as his warehouse for lead. Being in insolvent circumstances, he did not wish to accept a cargo of lead purchased by him, but not paid for ; but in order to set

(a) *James v. Griffin*, 2 M. & W. 623.

(b) *Jackson v. Nichol*, 5 Bing. N. C. 508.

(c) *Rowe v. Pickford*, 8 Taunt. 83.

(d) *Foster v. Frampton*, 6 B. & C. 107.

the ship free, he told the captain to land it on Beale's wharf. He intended this not to be a delivery to himself, but he did not communicate his intention to the wharfingers, and they seem to have considered themselves as agents to hold possession for him; then the goods were stopped. The Court of Exchequer all agreed that the question was, whether the possession of Beale's wharfingers was the possession of the bankrupt or not; but Lord Abinger thought that the intention in the bankrupt's mind not being expressed to the wharfingers was quite immaterial, and that the *transitus* was at an end. Parke, Bolland, and Alderson, BB., held that, except as a test of its reality, it did not matter whether he communicated the intention or not, and the *transitus* was by them held to continue. In that case the holder of the goods meant to hold them for the buyer; but that did not render his possession the constructive possession of the buyer, because the buyer's assent was wanting.

In *Jobson v. Eppenheim and Co. (a)*, in 1905, the plaintiff sold ten tons of waggon brass to the defendants ex York stores to be forwarded to the Co-operative Wholesale Society at Goole. The defendants informed the Co-operative Society, who were shipping agents, that they would receive the brass and forward it per steamer to Hamburg. The plaintiff sent the goods to Goole, where they were received by the Co-operative Society and forwarded to Hamburg. When the goods arrived at Hamburg, the plaintiff, who was unpaid, telegraphed to the Co-operative Society's branch at that city instructions not to deliver. *Held*, that the transit ended at Goole when the goods were received there by the Co-operative Society as agents for the defendants.

In *Heinekey v. Earle (b)*, in 1857, the plaintiff had consigned hemp to Horn in Sunderland, where it arrived on the 2nd of February, and Horn, finding himself insolvent, and being anxious not to receive the hemp, on the following day instructed his manager to go to the wharf where the hemp

(a) *Jobson v. Eppenheim and Co.*, 21 T. L. R. 468.

(b) *Heinekey v. Earle*, 28 L. J. Q. B. 79; 8 E. & B. 410.

was lying and countermand the delivery. The hemp, notwithstanding these instructions, was delivered at Horn's works during his absence, and Horn stopped payment in the evening. He consulted a solicitor as to whether he could return the hemp, and was advised he could not do so. On the 6th the seller demanded the hemp from Horn. It was held, reluctantly, by the Court of Queen's Bench, and the judgment was affirmed in the Exchequer Chamber, that although the goods had not ceased to be *in transitu*, merely because they were on Horn's premises, yet the *transitus* had ceased under the circumstances, Horn having assented to their remaining there before the 6th, the date when the plaintiffs demanded them.

In the case of *Bolton v. The Lancashire and Yorkshire Railway Co. (a)*, in 1866, both the seller and the buyer repudiated the ownership of certain goods lying at a station on the defendants' line, until the buyer became bankrupt, when his assignee made a claim to them. The real question was, whether the company held the goods as the bailee of the buyer, or merely as an agent to forward. Parsons had purchased eleven skips of cotton twist from Wolstencroft, and after taking three of them declined to receive any more. Wolstencroft sent the remaining eight to Brierly, a station on the defendants' line, and instructed the defendants to deliver them to Parsons. Parsons' carter took four of them away by mistake, and Parsons returned them at once, and then consigned the whole eight back to Wolstencroft at Salford; but Wolstencroft refused to receive them, and sent them to Brierly a second time, where Parsons again refused to have anything to do with them. Subsequently Wolstencroft instructed the railway company not to deliver the goods to Parsons, and obtained possession of them. The Court held that Wolstencroft had effectually stopped the goods. Erle, C. J., said, "As to the four which were taken by the carman "to his mill, they were so taken without his orders, and "against his will; it was just the same as if they had been

(a) *Bolton v. Lancs. and Yorks. Ry. Co.*, 36 L. J. Ch. 361; L. R. 1 C. P. 431.

“carried by a wrong-doer. It was urged by Mr. Holker, “that, being repudiated by both parties to the contract, the “goods remained in the hands of the railway company as “warehouseman for the real owner, that is, for Parsons. “There is no doubt but that the carrier may and often does “become a warehouseman for the consignee; but that must “be by virtue of some contract or course of dealing between “them, that, when arrived at their destination, the character “of carrier shall cease, and that of warehouseman supervene. “Here, however, there is no evidence of any such contract or “course of dealing.”

In *Jackson v. Nichol* (a), in 1839, the bankrupt repeatedly demanded the goods from the holders before any stoppage *in transitu*, but they refused to give them up, and the Court of Common Pleas held that the goods had not come to the possession of the bankrupt. There the assent of the actual holder was wanting, and it seems to have been the only thing wanting to put an end to the *transitus*.

So also in *Lackington v. Atherton* (b), in 1844, where the buyer before his insolvency demanded the goods from the warehousemen, but they refused to deliver them on account of an informality in the delivery order, the Common Pleas held that there was no possession taken by the purchaser so as to determine the seller's rights. In that case, had the warehousemen assented to the informal delivery order, they would have given possession to the buyer; and the case, therefore, seems the converse of *James v. Griffin* (c), as in the one case the bailee of the goods meant to hold them for the buyer, who did not assent, and in the other the buyer required the bailee to hold them for him, but the bailee did not assent.

The agent to forward may very well agree to hold the goods as an agent to keep the goods, without thereby abandoning any lien which he may have in the capacity of carrier,

(a) *Jackson v. Nichol*, 5 Bing. N. C. 508, *ante*, p. 395.

(b) *Lackington v. Atherton*, 13 L. J. C. P. 140; 8 Scott, N. S. 38; 7 M. & G. 360.

(c) *James v. Griffin*, 2 M. & W. 624, *ante*, p. 395.

for freight or otherwise. He may in substance say, "I will hold the goods for you, and at your disposal, but neither you nor any one else shall take them away without paying my charges;" and if such an agreement is come to, the *transitus* is ended. It is, therefore, no conclusive test of a *transitus* or none, whether the buyer has acquired an immediate right to the possession or not, though it may afford strong evidence as to the nature of the actual holder's possession, which it is conceived depends upon mutual intention.

Before the point was finally decided by Act of Parliament it was generally thought that the buyer had a right to anticipate the end of the transit and thus defeat the seller's right of stoppage, and the law is now settled by section 45 (2) of the Sale of Goods Act, which provides that "if the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end."

In *Whitehead v. Anderson* (a), in 1842, the assignees of the bankrupt buyer of a cargo of timber to arrive at Wyrewater, directed Benbow to take possession, and accordingly, as soon as the ship arrived, Benbow went on board and told the captain that he had come to do so. To this the captain made no reply, but invited him into the cabin, into which the ends of the timber projected, and there Benbow saw and touched them. The captain subsequently said he would deliver the cargo to Benbow when he was satisfied about the freight, but he did not consent to deliver immediate possession, or to waive his lien for freight. They then went ashore. The seller's agent went on board afterwards, and told the mate that he had come to stop the goods, and the defendants, who were the seller's agents, subsequently obtained possession. The Court held that what took place between Benbow and the captain did not amount to a constructive possession by the buyers, and gave judgment for the defendants.

Parke, B., in delivering the judgment of the Court, states

(a) *Whitehead v. Anderson*, 9 M. & W. 518; Tudor's L. C. Merc. Law, 632.

the law on this point thus : " The law is clearly settled that
" the unpaid vendor has a right to retake the goods, before
" they have arrived at *the destination originally contemplated*
" *by the purchaser*, unless in the meantime they come to the
" actual or constructive possession of the vendee. If the
" vendee take them out of the possession of the carrier into
" his own, with or without the consent of the carrier, there
" seems to be no doubt that the transit would be at an end ;
" though in the case of the absence of the carrier's consent,
" it may be a wrong to him for which he would have a right
" of action. This is a case of actual possession, which cer-
" tainly did not occur in the present instance. A case of
" constructive possession is where the carrier enters, expressly
" or by implication, into a new agreement distinct from the
" original contract for carriage, to hold the goods for the
" consignee as his agent ; not for the purpose of expediting
" them to the place of original destination pursuant to that
" contract, but in a new character, for the purpose of custody
" on his account, and subject to some new or further order to
" be given to him. It appears to us very doubtful, whether
" an act of marking or taking samples, or the like, without
" any removal from the possession of the carrier, though done
" with the intention to take possession, would amount to a
" constructive possession, unless accompanied by such cir-
" cumstances as to denote that the carrier was intended to
" keep and assented to keep the goods in the nature of an
" agent for custody. In the case of *Foster v. Frampton* (a),
" it is clear there were such circumstances : whether in that
" of *Ellis v. Hunt* (b), is doubtful ; but it is unnecessary to
" determine this point, as there is no finding in this case,
" even of any act done to the timber, with intent to take
" possession. It is said, indeed, that the agent of the assignees
" touched the timber, but whether by accident or design is
" not stated. There being then no such act of ownership,
" it seems to us, that unless by contract with the captain,

(a) *Foster v. Frampton*, 6 B. & C. 107.

(b) *Ellis v. Hunt*, 7 T. R. 46.

“express or implied, the relation in which he stood before
“as a mere instrument of conveyance to an appointed place
“of destination was altered, and he became the agent of the
“consignee for a new purpose, there was no constructive
“possession on the part of the vendee.”

In the judgment in *Whitehead v. Anderson* (a), which was evidently prepared with great care, it is probable that every word is significant. It is, therefore, to be considered what was intended by the phrase, “the destination originally contemplated by the purchaser.” If goods are delivered at a wharf or inn without any statement as to whether they were to be received as a step on their progress towards the buyer, by force of the original delivery to the carrier, or in order to be held till the buyer gives fresh orders, and the wharfinger or innkeeper accept the goods with the intention of acting in the capacity in which he should discover they were meant to be delivered to him; the capacity in which he held the goods would apparently depend entirely on what was the destination intended by the buyer; and if the buyer sent him directions to forward the goods, the question whether he was acting under the control of the buyer, as in *Dixon v. Baldwin* (b), or merely as an agent to forward, as in *Coates v. Railton* (c), would probably depend on what was the original destination; but it seems pretty clear that the mere arrival at the spot where the buyer meant them to be taken possession of, does not in itself terminate the *transitus*, unless there is something amounting to a delivery of possession, or an agreement to change the character of the custody. In *James v. Griffin* (d), the goods were deliverable *in the river*, yet the *transitus* was not ended, even by landing the goods on the wharf, because there was wanting an intention to take possession. In *Crawshay v. Eades* (e), in 1823, the goods were partially landed on the buyer’s wharf, but yet the *transitus*

(a) *Whitehead v. Anderson*, 9 M. & W. 518, *ante*, p. 399.

(b) *Dixon v. Baldwin*, 5 East, 175, *ante*, p. 382.

(c) *Coates v. Railton*, 6 B. & C. 422, *ante*, p. 383.

(d) *James v. Griffin*, 2 M. & W. 623, *ante*, p. 395.

(e) *Crawshay v. Eades*, 1 B. & C. 181.

was held not at an end, because it was not the intention of the carrier to give the buyer possession. It would seem, therefore, that the destination originally contemplated by the buyer is exceedingly material, to explain the capacity in which an agent holds possession where that is ambiguous, but not otherwise.

In *Coventry v. Gladstone* (a), in 1868, the consignee of a cargo pledged the bill of lading with the plaintiffs, who on receiving notice of the arrival of the ship presented it to the ship's brokers and obtained an "overside" order for the delivery of the cargo, and sent it by their lighterman to the ship. The lighterman presented it to the ship's officer, who said that as soon as the cargo could be got at, it should be delivered to him. Subsequently the goods were stopped, and Sir W. Page Wood, V.-C., held that the stoppage subject to the mortgage was good.

The doctrine that acts, such as taking possession of part of the goods, taking samples or the like, have not in themselves as a matter of law any effect on the character in which the possession of the residue is held, but are no more than evidence showing the intention of the parties as to the capacity in which that possession is to be held, has been more than once acted upon. Section 45 (7) of the Sale of Goods Act provides that: "Where part delivery of the goods has "been made to the buyer, or his agent in that behalf, the "remainder of the goods may be stopped *in transitu*, unless "such part delivery has been made under such circumstances "as to show an agreement to give up possession of the whole "of the goods." In *Jones v. Jones* (b) the Court of Exchequer decided that the acts of taking possession of part were equivocal, and in that case amounted to taking possession of the whole. In *Dixon v. Yates* (c), the King's Bench decided that under the circumstances of that case, taking possession of part was not taking possession of the whole (d).

(a) *Coventry v. Gladstone*, 37 L. J. Ch. 492; L. R. 6 Eq. 44.

(b) *Jones v. Jones*, 8 M. & W. 431.

(c) *Dixon v. Yates*, 5 B. & Ad. 313.

(d) See also *Stubey v. Hayward*, 2 H. Bl. 504; *Hammond v. Anderson*, 1 B. & P. N. R. 69; *Bunney v. Pointz*, 4 B. & Ad. 568; *Tanner v. Scovell*, 14 L. J. Ex.

It is to be observed, that the Court of Exchequer seem in *Whitehead v. Anderson* (a) to state it to be law, and it is now settled law, that the purchaser may anticipate what may be called the natural end of the *transitus*, by taking possession of the goods, and that if he does take actual possession, it determines the seller's rights, even if the taking of possession be a trespass as against the carrier. The cases on this point are worthy of examination. In *Holst v. Pownal* (b), in 1795, the facts as reported were as follows :—The vessel with the goods on board arrived at Liverpool, which was the port of discharge, and an agent of the bankrupt buyer who was consignee went on board in order to take possession, and opened some of the packages, and then the vessel was ordered off to the quarantine ground, the agent of the buyer remaining on board to keep possession. Before the quarantine ended, and therefore before the vessel could regularly be discharged, the goods were stopped *in transitu*; and Lord Kenyon first, and afterwards the King's Bench in banc, held that the stoppage was good. The reporter has not informed us whether the captain of the ship assented to these premature acts of ownership or not, and evidently in his opinion the sole ground of the decision was that the voyage had not terminated. The accuracy of this opinion may, however, be doubted; for only six years later, in *Mills v. Ball* (c), in 1801, Lord Alvanley treats it as quite settled, "that though the right of stoppage continues until the goods have reached their journey's end, yet if the vendee meet them upon the road, and take them into his own possession, the goods will then have arrived at their journey's end, with reference to the right of stoppage *in transitu*." If the decision of the King's Bench is correctly given in *Espinasse*, it must be owned Lord Alvanley overrules it decidedly. If it turned on the fact of the captain of the

321; 14 M. & W. 28; *Bolton v. Lancs. and Yorks. Ry. Co.*, 36 L. J. Ch. 361; L. R. 1 C. P. 440; *Ex p. Cooper*, 11 Ch. D. 72; *Kemp v. Fulk*, 14 Ch. D. 446; 7 App. Ca. 586.

(a) *Ante*, p. 399.

(b) *Holst v. Pownal*, 1 Esp. 242.

(c) *Mills v. Ball*, 2 B. & P. 457.

ship not assenting, so that the possession if taken at all was a trespass against him, the case is untouched by Lord Alvanley's opinion.

In *Wright v. Laues* (a), in 1801, Lord Kenyon is represented by the same reporter as deciding, that where goods bought by a person resident at Norwich were delivered into his possession by the carrier at Yarmouth, on their way from London to Norwich, they were no longer *in transitu*. In *Abbott on Shipping*, Lord Tenterden, after citing the case of *Holst v. Pownal* (b), remarked that the doctrine of this case is in exact conformity to the tenor of a bill of lading, by which the master always engages to deliver at the place of destination, and which therefore gives no authority to the consignee to demand the goods before their arrival at that place. On this Parke, B., in *James v. Griffin* (c), has remarked, that "it is difficult to understand how a bill of lading, which is "only a contract between the vendee and the shipper for the "carriage, can make any difference." If it is material to inquire whether the possession taken was wrongful as against the carrier or not, the contract between the buyer and the shipowner may make a difference; if it be, as was said in *Whitehead v. Anderson* (d), not material, whether it was wrongful or not, what that contract was does seem unimportant.

It was decided by Lord Kenyon (e), and in a subsequent case (f) by Lord Ellenborough, that where goods were in the custody of the custom house officers, who had a right to retain them and sell them for unpaid duties, they were still *in transitu*, although the assignees of the bankrupt buyer had petitioned the customs for them previously to any stoppage. Lord Kenyon is reported to have given as his reason, "that the bankrupt had no right to the actual "possession till the duties were paid." It is difficult to think that the buyer could have bettered his position as against the

(a) *Wright v. Laues*, 4 Esp. 82.

(b) *Holst v. Pownal*, 1 Esp. 242.

(c) *James v. Griffin*, 2 M. & W. 623.

(d) *Whitehead v. Anderson*, 9 M. & W. 518.

(e) *Northey v. Field*, 2 Esp. 613, in 1798.

(f) *Nix v. Olive*, *Abbott on Shipping*, 14th ed., 851.

seller, by breaking the King's cellars and seizing the goods without leave of the customs.

In a case in 1802 (*a*), where this point did not arise, it was urged as an illustration, and Chambre, J., expressed his opinion as follows:—"Perhaps the consignee himself "may intercept the goods in their passage, and indeed I "have little doubt but that if he do intercept them in their "passage, before the consignor has exercised his right of "stoppage *in transitu*, and do take an actual delivery from "the carrier before the goods get to the end of their journey, "that such a delivery to him will be complete. And I will "not say but that his creditors in the case of an execution "against him may have the same right."

In the case of *Jackson v. Nichol* (*b*), in 1839, the goods were consigned to the buyer at London, and he repeatedly demanded the goods from the ship after the vessel had arrived in the Thames, but before the customary time for delivery, and was refused; and a subsequent stoppage was held good. In delivering the judgment of the Court of Common Pleas, Tindal, C. J., observes on this point:—"It "was urged on the part of the defendants, on the authority "of the dictum of Lawrence, J., in *Bohtlingk v. Inglis* (*c*), "that the tortious act of a third person should not prejudice "the rights of the parties, and consequently, that the demand "made by the purchaser on the 29th, and the unlawful "refusal to deliver, was tantamount to a delivery. But it is "to be recollected in the first place, that the observation of "Lawrence, J., was made in the case of a demand by the "consignor, for the purpose of revesting his property in the "goods, and not in the case of a vendee. And in the second "place, that here the goods had not actually reached the "terminus of their delivery, when the demand of the vendee "took place; and although it might be conceded to be the "better opinion, that if the vendee actually receives the "possession of his goods on their passage to him, and before

(*a*) *Oppenheim v. Russel*, 3 B. & P. 42, in 1802, *post*, p. 410.

(*b*) *Jackson v. Nichol*, 5 Bing. N. C. 508, *ante*, p. 384.

(*c*) *Bohtlingk v. Inglis*, 3 East, 381, *ante*, p. 379.

“the voyage has completely terminated, that the delivery is complete and the right of stoppage gone; yet no authority has been cited for the position, and the principle seems the other way, that a mere demand by the vendee without any delivery before the voyage has completely terminated, deprives the consignor of his right of stoppage.”

In *Valpy v. Gibson* (a), in 1847, goods were sent from Leeds to be shipped at Liverpool for Valparaíso, and after having been put on board, were relanded and returned to Leeds, by order of the *buyer*, in order to have them repacked. It was held that the buyer had dealt with the goods as his own, and that the *transitus* was thereby terminated.

The judgment of the Exchequer in *Whitehead v. Anderson* (b) has already been cited as far as it bears on this point. It only remains to remark, that the observations of the Court in that case are of greater weight, because the point arose in that case, and was argued, though the decision of the Court turned upon another point. Such being the authorities, it seems pretty clear, that in cases in which there is no actual delivery, if the buyer requires that the carrier shall hold the goods as his agent in a new capacity, and he assent, the *transitus* is ended, whether it be before or after its natural termination; and if the carrier does not assent, and is under no obligation to assent, that the *transitus* is not ended. But, perhaps, if the position of the carrier is such that it is his duty to obey the command of the buyer, his assent to do his duty would be implied by law, and his refusal in fact, would not prevent such an implication. And notwithstanding the expressions of the Exchequer in *Whitehead v. Anderson* (b), it is submitted that it is doubtful whether when the carrier has a right to refuse to allow the buyer to take even constructive possession, the buyer can improve his position by a tortious taking of actual possession against the will of the carrier. The law in general discountenances violence, and it would seem not consistent with its general policy, to give a

(a) *Valpy v. Gibson*, 4 C. B. 837, 865; 16 L. J. C. P. 241, *ante*, p. 385.

(b) *Whitehead v. Anderson*, 9 M. & W. 518, *ante*, p. 399.

man a benefit in consequence of his forcible or fraudulent wrong against a third party. The act of taking away the goods would be a very unequivocal assertion of the buyer's claim to exercise dominion over the goods if he had the right so to do, but it is very difficult to see how it could give him such a right if he had it not already.

If this be a correct view of the principle, the question whether actual possession taken by the buyer against the assent of the carrier terminates the *transitus* or not, depends on the carrier's right to insist on continuing to hold them on the original consignment. And possibly an unequivocal demand of possession made upon the middleman and refused by him, may have the same effect upon the *transitus* that an actual taking of possession against the assent of the middleman would have had. That is, it would terminate the *transitus* if the refusal was so tortious as to render the middleman liable in trover, just as the actual taking of possession would terminate the *transitus* if it was justifiable against the middleman. In *Holst v. Pownal* (a), and *Jackson v. Nichol* (b), the shipowner could not reasonably be bound to deliver the cargo at the spots where the demand was made, and the consignee could only insist on his fulfilling the contract of carriage already made; and if in *Holst v. Pownal* (a) the captain refused to assent to the buyer's acts of ownership, Lord Kenyon's decision was in perfect consistency with the decision in *Jackson v. Nichol* (b), and not inconsistent with his judgment in *Wright v. Laues* (c).

This view was confirmed by the case of *Bird v. Brown* (d), in 1850. The goods had been stopped in the hands of a carrier, although by one who had no power to exercise the right of stoppage; consequently, the carrier refused to deliver the goods to the buyer, but delivered them to the person who had stopped them. The Court held that the *transitus* was at an end when the consignees demanded

(a) *Holst v. Pownal*, 1 Esp. 242.

(b) *Jackson v. Nichol*, 5 Bing. N. C. 508.

(c) *Wright v. Laues*, 4 Esp. 82.

(d) *Bird v. Brown*, 19 L. J. Ex. 154; 4 Ex. 786.

the goods and tendered the freight, and that the wrongful refusal of the carrier did not affect the rights of the consignee.

The Sale of Goods Act embodies this principle by enacting in section 45 (6), that "Where the carrier or other bailee or "custodier wrongfully refuses to deliver the goods to the "buyer, or his agent in that behalf, the transit is deemed to "be at an end."

The case of the *London and North Western Railway Co. v. Bartlett (a)*, in 1861, was not a case of stoppage *in transitu*, but is relevant to the subject of the anticipation of the termination of the *transitus*. The action was by the seller against the railway company for not delivering wheat at the mill of the buyer, after the buyer had instructed the company to let it lie at one of their stations, and not to deliver it at the mill. Bramwell, B., said:—"The goods "are intended to reach the consignee, and provided he "receives them, it is immaterial at what place they are "delivered. The contract is to deliver the goods to the "consignee at the place named by the consignor, *unless* "the consignee directs them to be delivered at a different "place."

In the *Cork Distilleries Co. v. The Great Southern Railway Co. (b)* in the House of Lords, in 1874, the plaintiffs suffered considerable loss in consequence of the defendants having delivered several puncheons of whisky to the buyer at one of their stations instead of at the customs warehouse, to which they had been consigned. It was held that the defendants were not liable; the contract for delivery being made between the carrier and the consignee, the consignor being the agent for the consignee to make it, which entitled the consignee to take delivery either at the place indicated at the time of the departure of the goods, or at any other place at which he afterwards preferred to receive the goods.

But where the goods have arrived at their journey's end, the carrier is bound to deliver them on payment of his charges,

(a) *London and North Western Ry. Co. v. Bartlett*, 31 L. J. Ex. 92; 7 H. & N 400.

(b) *Cork Distilleries Co. v. Great Southern Ry. Co.*, L. R. 7 E. & I. App. 269.

and if the charges are not tendered, though the carrier is not bound to deliver the goods, it may be that his right is no longer to insist on keeping the goods as carrier, but merely to retain the possession, holding the goods subject to any orders of the buyer, not derogatory to his lien. In *Ellis v. Hunt* (a), in 1789, Buller, J., puts the case on the ground that—"The carrier would not have been liable in the character of a carrier, for the goods had got to the end of their destined journey, but he would have been answerable only as warehouse-keeper." It does not appear from the case, whether this supposed alteration in his character proceeded from some agreement so to consider himself, or because he had performed his contract of carriage, and therefore was bound as a matter of law, to act in this varied character when required.

The *transitus* is determined when the goods come to the actual or constructive possession of one, to whom the original buyer's rights have been transferred, exactly as when they come to the possession of the original buyer himself. And it does not make any difference whether the transfer is by the contract of the buyer, as if he sells the goods before their arrival to a third party, or by operation of law, as when the buyer has become bankrupt, and consequently his rights have passed to his assignees. When, therefore, there is a sub-buyer, his possession terminates the *transitus* (*Dixon v. Yates* (b)), and so does that of the assignees of a bankrupt buyer, or their agents. At one time there seems to have been a feeling that this was hard, and that the assignees, whose rights depended entirely on the bankruptcy, should not in fairness take goods sold on the credit of the bankrupt and not yet paid for; but the law was not doubted to be so settled, even by those who questioned its propriety. "On looking into the cases," said Lord Alvanley, in *Scott v. Pettit* (c), in 1803, "I find that we are bound to hold, that though a bankrupt has altogether ceased to be a trader, yet that his

(a) *Ellis v. Hunt*, 3 T. R. 464.

(b) *Dixon v. Yates*, 5 B. & Ad. 346, *ante*, p. 370.

(c) *Scott v. Pettit*, 3 B. & P. 469.

“warehouse continues open for the purpose of receiving goods, and that the assignees have a right to take possession of everything that may come into their hands, without paying a single farthing. . . . No doubt, therefore, for the purpose of receiving goods, the assignees stand in the place of the bankrupt.” It may therefore be stated, that a third party acquiring property in the goods from the original buyer, has rights as extensive as the original buyer. But where by agreement between the carrier and the buyer, or by act of law, something is to intervene before the carrier is to deliver the goods, beyond what would arise in an ordinary case of carriage, that is not to be considered as making the carrier an assignee of the goods from the buyer, so as to make his possession terminate the *transitus*.

In *Oppenheim v. Russel* (a), in 1802, the goods were stopped by the plaintiff in the hands of the carrier. The plaintiff consigned goods by the defendant, a carrier, to a buyer who owed money to the defendant for the carriage of other goods. On the buyer's insolvency the plaintiff stopped the goods and tendered the defendant his charges in respect of these goods, but the defendant refused to give them up unless he was paid the whole sum due to him from the buyer. The case for the defence was, that the stoppage was not good, at least against the carrier, because, by agreement with the consignee, the carrier had a lien on the goods for the general balance of his account against the insolvent consignee. Lord Alvanley rejected some evidence tendered to prove this defence, and on application for a new trial the Common Pleas decided that the evidence was improperly rejected, but that there should be no new trial, because, though the carrier might have a lien as against the consignee, it would not affect the seller's right to stop the goods. At Nisi Prius, Lord Ellenborough, in *Smith v. Goss* (b), in 1808, approved of this decision and extended it. There the seller sent goods by the buyer's direction to a carrier to be forwarded,

(a) *Oppenheim v. Russel*, 3 B. & P. 42.

(b) *Smith v. Goss*, 1 Camp. 282.

and stopped the goods in his hands. A creditor of the buyer had, previously to the stoppage, attached the goods in the carrier's hands, by a process out of the Mayor's Court of London. Lord Ellenborough said, that the seller's right was the elder and preferable lien, and not superseded by the attachment.

The carrier, it is obvious, was not the less an agent to forward, though he had a general lien against the consignee. The right to retain possession till he was paid the larger sum, made his possession more valuable to him, but did not alter its character in the least. He was still an agent to forward. And from the peculiar nature of a foreign attachment, it seems not to alter the character of the holder of the property. It is probable that a seizure by the sheriff, under an execution against the buyer, would be held to terminate the *transitus*, for the reasons suggested by Chambre, J., in *Oppenheim v. Russel* (a).

The right of stoppage in transitu can be exercised only when the buyer is insolvent or has become bankrupt.

Insolvency is thus defined by section 62 (3) of the Sale of Goods Act:—

“A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not. . . .”

It is very usual for a seller to reserve to himself by the terms of the contract of sale, and of the contract which he makes with the carrier, a right to prevent or delay the delivery of the goods to the buyer until some conditions are fulfilled. When this is the case, the solvency of the buyer is beside the question; neither he nor his representatives can have any right to take possession until the

(a) *Oppenheim v. Russel*, 3 B. & P. 42.

conditions are fulfilled, or are waived by the seller. There is a good deal of difficulty at times, in determining whether the conditions which the seller has endeavoured to make conditions precedent to the delivery of the possession, are or are not binding on the buyer. On this subject something has been already said^(a). But when the conditions are binding, the case is not one of stoppage *in transitu*, but rather a case in which the peculiar circumstances have prevented the *transitus* ever commencing, as the carrier, instead of being an agent to forward from the seller to the buyer, has agreed to be an agent to keep possession for the seller, till the conditions are fulfilled. The right of stoppage *in transitu* is a right to interfere and prevent the buyer from taking actual possession, which he would otherwise have a right to take, and to undo the effect of an unconditional delivery to an agent to forward. This power does not exist, except in the case of insolvency.

In *Walley v. Montgomery* ^(b), in 1803, the consignor's agent Montgomery obtained possession of the goods, and refused to deliver them to the consignee, Walley, unless he would pay the price in cash. Lord Ellenborough, at the trial, thought that the consignment was, from the first, conditional, and nonsuited the plaintiff, but on its being shown that the consignment was not conditional, the nonsuit was set aside. Walley was not insolvent; if he had been, this would have been a good stoppage *in transitu*, and he would have had no cause of action.

In the case of *The Constantia* ^(c), in 1807, in which Lord Stowell had to decide on the effect of an attempted revendication under the old law of France, where the seller had acted under a mistake as to the insolvency of the consignee, he decided that it was a nullity, inasmuch as the insolvency did not ensue; but that if the buyer had become insolvent it would have been good. The law of revendication was analogous to the law of stoppage *in transitu*, and Lord

(a) *Ante*, p. 152.

(b) *Walley v. Montgomery*, 3 East, 585, *ante*, p. 154.

(c) *The Constantia* (*Henrickson*), 6 Rob. 321.

Stowell, in his judgment, quoted the earlier editions of Abbott on Shipping, and stated the general English law of stoppage *in transitu* as bearing on the question. Lord Tenterden, in the later editions of his book, adopted the judgment of Lord Stowell, as an illustration of the English law. There is no doubt now of the proposition in which these two great authorities concurred, that "the mercantile law is clear and distinct that the seller has not a right to vary the consignment, except in case of insolvency." It seems, though there is no direct authority for the proposition, that the law is precisely the same in the case of a carrier by land as in that of one by sea.

There is no necessity that the buyer should have been formally declared a bankrupt if he has become insolvent (*a*). There must, of course, in all cases be great difficulty in proving that a person, who has not stopped payment, is, in fact, not solvent, and there seems to be no case in which this has been attempted; but the text books and dicta of the Judges do not restrict the use of the term "insolvent," or "failed in his circumstances," to one who has stopped payment. There must, however, be great practical difficulty in establishing the actual insolvency of one who still continues to pay his way; and as the carrier obeys the stoppage *in transitu* at his peril if the consignee be in fact solvent, it would seem no unreasonable rule to require that, at the time the consignee was refused the goods, he should have evidenced his insolvency by some overt act (*b*).

(*a*) *Biddlecombe v. Bond*, 4 A. & E. 337.

(*b*) Sir W. M. James said that a company was insolvent when its assets and existing liabilities were such as to make it reasonably certain that the existing and probable assets would be insufficient to meet the existing liabilities. A man is insolvent, said Willes, J., when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do. See *In re European Life Assurance Society*, in 1869, 39 L. J. Ch. 324; 9 Eq. 128; and *Queen v. Saddlers Co.*, 32 L. J. Q. B. 345; 10 H. L. R. 426; *Bayley v. Schofield*, 1 M. & S. 338; *Parker v. Gossage*, 2 C. M. & R. 617; *Doe v. Rees*, 4 Bing. N. C. 384; *Shaw v. Lucas*, 3 Dow. & Ry. 218; *In re London and Manchester Industrial Association*, 45 L. J. Ch. 170; 1 Ch. D. 472; *In re Phoenix Bessemer Steel Co.*, 4 Ch. D. 108; *Ex parte Carpenter*, Mont. & McAr. 5; *Nixon v. Verrey*, 54 L. J. Ch. 736; (1885) 29 C. D. 196.

In *Schotsmans v. Lancashire and Yorkshire Railway Co. (a)*, in 1865, Romilly, M. R., said: "It is sufficient for the purpose of stoppage *in transitu* to show that the vendor "was in such circumstances as not to be able to meet his "engagements."

The stoppage in transitu must, to be effectual, be on behalf of the seller, with an intention to exercise this power, as of right and independently of the buyer's assent.

Even if the seller's agent take actual possession of the goods, that is not necessarily a stoppage *in transitu*, unless it be done with that intent. This was decided by the King's Bench in 1805, in *Siffkin v. Wray (b)*, in which one who was maintained to be the seller's agent, took possession of the goods by consent of the bankrupt, in trust, to sell them and apply the proceeds to take up the bills drawn against the goods. The Court held, that even if he had been the seller's agent that was no stoppage. But a stoppage of the goods done with intent to stop them, by a right paramount to that of the buyer, is not invalidated by being with the consent and approval of the buyer, or even by being originated by him. • In *Mills v. Ball (c)*, in 1801, the Court of Common Pleas held, that where a buyer wrote to the seller to say he was insolvent, and told him where the goods were, in order that he might stop them, the consequent stoppage was not invalid.

At one time it seems to have been supposed that in order to make a good stoppage *in transitu*, there must have been an actual taking possession of the goods by the seller or his agent, but it is now clearly settled, that the seller's rights are complete on giving the person who has the possession of the goods notice of the seller's claim to stop the goods, at a time when he can obey it, although there is neither an actual

(a) *Schotsmans v. Lancs. and Yorks. Ry. Co.*, L. R. 1 Eq. at p. 360.

(b) *Siffkin v. Wray*, 6 East, 371.

(c) *Mills v. Ball*, 2 B. & P. 457.

taking of possession by the person stopping the goods, nor such an assent on the part of the holder as would amount to a constructive possession.

Section 46(1) of the Sale of Goods Act provides that :—"The
"unpaid seller may exercise his right of stoppage *in transitu*
"either by taking actual possession of the goods, or by giving
"notice of his claim to the carrier or other bailee or custodier
"in whose possession the goods are."

In *Mills v. Ball* (a), in 1801, the wharfinger who had the possession of the goods told the seller's agent, who demanded them from him, that "he would not deliver them till he was
"certain of a safe delivery," and the Court of Common Pleas held that, after that assent, the goods as against him were in the seller's possession; the Court guarded themselves against being supposed to decide what might be the case when the holder gave no assent.

In *Bohtlingk v. Inglis* (b), in 1803, the Court of King's Bench decided, that a demand on behalf of the seller on the master of the ship in which the goods were, was a stoppage as against the assignees of the buyer, who had obtained a delivery from the master.

In *Litt v. Cowley* (c), in 1816, the Court of Common Pleas went further: the goods there were delivered to Pickfords, the carriers, at Manchester, to be delivered in London. Notice was given by the sellers to Pickfords' house at Manchester, to stop the goods, at a time when the goods were on the road, and when, therefore, the Manchester house could not have delivered them to the buyer. They forwarded the notice to their house in London, it arrived in plenty of time, but, by some blunder, the goods were delivered. The Court held that this notice revested the seller's rights, and that he might maintain trover against the assignees of the bankrupt buyer, who refused to return the goods (d).

(a) *Mills v. Ball*, 2 B. & P. 457.

(b) *Bohtlingk v. Inglis*, 3 East, 381.

(c) *Litt v. Cowley*, 7 Taunt. 169.

(d) See *Kemp v. Falk*, *post*, p. 440; 14 Ch. D. 446; 7 App. Ca. 585.

Section 46 (1) of the Sale of Goods Act in dealing with the subject of notice provides that :—"Such notice may be given "either to the person in actual possession of the goods or to his "principal. In the latter case the notice, to be effectual, must "be given at such time and under such circumstances that the "principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a "delivery to the buyer."

In 1842, in *Whitehead v. Anderson* (a), an unsuccessful attempt was made to give to a notice given to the master carrier, the effect of stopping the goods *in transitu*, though given at a time when he could not obey it. In that case, the goods were at sea consigned to Fleetwood, in Lancashire, when notice was given to the shipowner, then resident at Montrose, to stop the goods. He endeavoured to do so, but the assignees of the bankrupt won the race, and reached the vessel first; it was contended, on the authority of *Litt v. Cowley* (b), that the notice given to the principal was a sufficient stoppage. The judgment of the Court on this point was as follows:—"We think it was not; but to make "a notice effective as a stoppage *in transitu*, it must be "given to the person who has the immediate custody of the "goods; or if given to the principal, whose servant has the "custody, it must be given as it was in the case of *Litt v. Cowley* (b), at such a time, and under such circumstances, "that the principal, by the exercise of reasonable diligence, "may communicate it to his servant in time to prevent the "delivery to the consignee; and to hold that a notice to the "principal at a distance is sufficient to revest the property "in the unpaid vendor, and render the principal liable in "trover, for a subsequent delivery by his servants to the "vendee, when it was impossible from the distance and want "of means of communication, to prevent that delivery, "would be the height of injustice. The only duty that can "be imposed on the absent principal, is to use reasonable

(a) *Whitehead v. Anderson*, 9 M. & W. 518.

(b) *Litt v. Cowley*, 7 Taunt. 169.

“diligence to prevent the delivery; and in the present case “such diligence was used” (a).

It has been pointed out in Benjamin on Sale (b), that the two methods of stoppage mentioned are probably not exhaustive, but should be considered as only illustrative of the general right declared by section 44.

The duty of the carrier on receiving a notice of stoppage is declared by section 46 (2) of the Sale of Goods Act:—“When “notice of stoppage *in transitu* is given by the seller to the “carrier, or other bailee or custodian in possession of the “goods, he must re-deliver the goods to, or according to the “directions of, the seller. The expenses of such re-delivery “must be borne by the seller.”

The unpaid seller's right to stop in transitu may be defeated before the termination of the transitus, by the assignment of the bill of lading to one, who bonâ fide gives value for a property in the goods shipped under it.

The enactments commonly called the Factors Acts, 4 Geo. 4, c. 83, 6 Geo. 4, c. 94, 5 & 6 Vict. c. 39, 40 & 41 Vict. c. 39, 52 & 53 Vict. c. 45, and the Bills of Lading Act of 1855, 18 & 19 Vict. c. 3, and the Sale of Goods Act, 1893, successively enlarged and altered the powers conferred upon holders of bills of lading, delivery orders, and what may be called documents of title.

Section 47 of the Sale of Goods Act provides:—“ . . . “that where a document of title to goods has been lawfully “transferred to any person as buyer or owner of the goods, “and that person transfers the document to a person who takes “the document in good faith and for valuable consideration, “then, if such last-mentioned transfer was by way of sale the “unpaid seller's right of lien or retention or stoppage *in “transitu* is defeated, and if such last-mentioned transfer was “by way of pledge or other disposition for value, the unpaid

(a) See also *ante*, p. 392.

(b) 4th ed., p. 910.

“seller’s right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee.” This section practically reproduces section 10 of the Factors Act, 1889 (see *post*, page 447), by which all documents of title were put on the same footing as bills of lading. This subject will be examined in greater detail at a later stage; for the present, it will be assumed that the statutes make no difference, and the inquiry will be as to the effect of those documents at common law.

“Much confusion,” said Lord Ellenborough, in *Waring v. Coxe* (a), “has arisen from similitudinary reasoning on the subject.” This curious phrase seems exactly to express the fact. Bills of lading have been likened to bills of exchange, and delivery orders and dock warrants have been likened to bills of lading, and the law applicable to any one class of such documents, has been supposed to extend by analogy to the others, which is the case only where the distinctions between these different kinds of documents are not material; and the effect of the assignment of an interest in the goods, which may accompany the assignment of the bill of lading, has not always been distinguished from the effect of the assignment of the bill of lading itself.

First, it is to be observed, the buyer who has not obtained possession of the goods, may, as soon as the sale is complete, transfer his rights in the goods, whether there exists a bill of lading or not. But when no document of title exists, he can transfer no right greater than that which belongs to himself. As has been already shown, the buyer has, from the moment the sale is complete, the general right of property, subject to the seller’s rights, and he may exercise every right of property consistent with the seller’s rights. He may sell the goods, subject to the first seller’s rights, and if he does so, the property is transferred to the second buyer, by the second sale, without any delivery of possession.

But though the second buyer acquires by his sale the legal property in the goods, and every right which his immediate

(a) *Waring v. Coxe*, 1 Camp. 369.

bargainor had in the goods, yet (if there be not an assignment of a bill of lading) he acquires no greater right; he takes the property subject to the same restrictions that his immediate seller held it under.

In *Dixon v. Yates* (a), in 1833, Dixon sold goods to Collard, who accepted bills for the price, and Collard, whilst the bills were still running, sold the goods to sub-buyers, who paid him the price, and afterwards Collard became insolvent. The King's Bench decided, that one of the sub-buyers, Bond, who had taken possession of a part of the goods, whilst Collard was solvent, was entitled to keep that part of the goods, for he had taken possession of them whilst Collard had a right to take possession, but that none of the sub-buyers had a right to take the goods, which at the time of the insolvency, remained undelivered, for that Collard's right to take possession was defeasible on his insolvency, and though they had bought from him, and *bonâ fide* paid him whilst he was solvent, yet they did not thereby acquire any right more extensive than his, that is to say, a right defeasible on his insolvency before he acquired possession.

In *Craven v. Ryder* (b), in 1816, it was decided, by the Common Pleas, that the seller's rights were not destroyed by a subsale and payment, but there the defendant (who was the shipowner and who had given a receipt for the goods to the plaintiff) was acting contrary to his own written acknowledgment, and it may, perhaps, be thought that that circumstance was the ground of the decision.

In *Nix v. Olive* (c), in 1805, the sellers, Abbot and Co., had sent the purchaser Fox an unindorsed bill of lading. The goods arrived, and Fox sold them to Nix, the plaintiff, who did not obtain possession. Fox became insolvent, and the defendants, who were agents of Abbot and Co., sold the wine. Nix brought trover, and Lord Ellenborough decided that Abbot and Co. still had the right to stop *in transitu*. It is to be observed, that there did, in that case, exist an unindorsed

(a) *Dixon v. Yates*, 5 B. & Ad. 313, *ante*, p. 370.

(b) *Craven v. Ryder*, 6 Taunt. 433.

(c) *Nix v. Olive*, Abbott on Shipping, 14th ed., 851.

bill of lading, but that could not prevent the property being transferred from Fox to Nix by the subsale: see *Nathan v. Giles* (a).

In *Akerman v. Humphrey* (b), in 1823, the Common Pleas decided that a sale by the buyer, accompanied by a delivery of the shipping note, did not put an end to the seller's rights to stop *in transitu*.

These authorities are sufficient to overrule what seems to have been the opinion of Buller, J., expressed in his celebrated argument in *Lickbarrow v. Mason* (c), in 1793, in the House of Lords, in which he contends that "goods can "never be stopped *in transitu* after they have been sold and "paid for, or money advanced upon them *bonâ fide*, and "without notice"; indeed, that opinion seems to have been overruled in that case, and has never since been acted upon. It may therefore be asserted, that a mere re-sale by the buyer does not divest the seller's rights when there is no assignment of a bill of lading. And a pledge of the goods cannot have more effect than a sale of them, even if a pledge of goods unaccompanied by something equivalent to a delivery of possession, passes any legal property in them, which is somewhat doubtful (d).

It is clear, also, that the buyer, if he has the right of possession, may give a third person authority to take possession of the goods without conferring on him any right of property whatever in them. If the carrier, or other holder of the goods, delivers them to such a person, it is a delivery to the buyer whose agent that person is, and such a delivery is for every purpose the same as a delivery to the buyer himself. If the carrier refuses to deliver the goods to the agent, it is in general the same thing (if there be due notice of the authority) as if he had refused to deliver them to the buyer himself, and if the refusal be not justifiable, the buyer has

(a) *Nathan v. Giles*, 5 Taunt. 558.

(b) *Akerman v. Humphrey*, cited 4 Bing. 522.

(c) *Lickbarrow v. Mason*, 6 East, 21, n. 34.

(d) But see the judgment of Willes, J., in *Meyerstein v. Barber*, 36 L. J. C. P. 57; L. R. 2 C. P. 52.

the same remedy as if the refusal had been to him in person. But the agent has no right of action for such a refusal. He has no right of property or possession in the goods, and can maintain no action in his own name for any wrong done to the right of possession or property of his principal, the buyer. In this respect, one who has merely got authority to receive the goods, differs from a sub-buyer; for the sub-buyer having himself acquired the legal rights of property and possession, such as belonged to his immediate seller, *i.e.*, vested though defeasible, may maintain in his own name an action for anything done in contravention of those rights after he has acquired them.

Such being the power of the buyer over the goods before he has taken possession, when there are no documents of title to the goods, the question arises, what difference does the existence of such documents make?

A bill of lading is a writing signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods, and undertaking to deliver them at the end of the voyage (subject to such conditions as may be mentioned in the bill of lading). The bill of lading is sometimes an undertaking to deliver the goods to the shipper by name, or his assigns, sometimes to order or assigns, not naming any person, which is apparently the same thing, and sometimes to a consignee by name, or assigns, but in all its usual forms it contains the word assigns.

The bill of lading is, therefore, a written contract, between those who are expressed to be parties to it, on behalf of their principals if they be agents, that is, generally speaking, between the master of the ship on behalf of his principals the shipowners, on the one part, and the person named as shipper of the goods on the behalf of the person who, at the time of shipment, was his principal, on the other part, by which it is agreed that the shipowner is to deliver the goods to the person who shall fill the character of assign.

The assignment of the bill of lading designates that person, and the master, by delivering the goods to him, fulfils the contract, and by refusing to deliver them to him, he breaks

the contract; but prior to the Bills of Lading Act of 1855 (a) the assignee of the bill of lading was not made a party to the contract with the master, nor could he, as assignee, maintain in his own name any action on the contract contained in the bill of lading. In this respect, the assignment of a bill of lading differed greatly from that of a bill of exchange, for the indorsee of a bill of exchange is by the law merchant entitled to sue the previous parties to the bill in his own name, and is by the indorsement rendered a party to the contract, though not one originally; but the contract contained in a bill of lading is a chose in action, and there was no means whatsoever by which any person could be rendered a party to the contract contained in a bill of lading, who was not a party to it from its first inception. Even if the assignee of the bill of lading had acquired the full legal and equitable property in the goods, so that the damage arising from the non-delivery was exclusively his, still he was compelled to bring any action on the contract in the name of the original contractor as his trustee; for, in general, contracts do not by the law of England run with goods, and no custom has ever been recognised making the contract contained in a bill of lading an exception (b).

The law on this point was altered by that Act (c), and now, "Every consignee of goods named in a bill of lading, and "every indorsee of a bill of lading to whom the property in "the goods therein mentioned shall pass, upon or by "reason of such consignment or indorsement, shall have "transferred to and vested in him all rights of suit, and be

(a) 18 & 19 Vict. c. 3, s. 1.

(b) *Sargent v. Morris*, 3 B. & A. 277, in 1820; *Thompson v. Dominy*, 15 L. J. Ex. 320; 14 M. & W. 403, in 1845; *Howard v. Shepherd*, 19 L. J. C. P. 249; 9 C. B. 297.

(c) 18 & 19 Vict. c. 3, s. 1. In *Short v. Simpson*, in 1866, 35 L. J. C. P. 147; 1 C. P. 248; the consignor indorsed the bill of lading as security for an advance. On his repaying the advance it was reindorsed to him, and it was held that he was thereby remitted to all his rights under the original contract. For the indorsee's liability for freight, see *Burdick v. Sewell*, 10 Q. B. D. 363, and 13 Q. B. D. 159; 10 App. Ca. 74; 52 L. J. Q. B. 428; 53 L. J. Q. B. 399; where the effect of the indorsement of a bill of lading by way of a pledge as distinguished from a sale was much considered.

“subject to the same liabilities in respect of such goods, as if
“the contract contained in the bill of lading had been made
“with himself.”

If, however, the goods when shipped are not the property of the shipper, he in general acts in shipping them as agent for the owner of the goods. When he does so, the principal is from the first a party to the contract, though made in the name of his agent, and may maintain an action upon it in his own name as well as in that of the agent. And his right to maintain such an action is not affected by his being named in the bill of lading as consignee, or by his subsequently becoming indorsee of the bill.

Anderson v. Clarke (a), in 1824, was an action by Anderson on the contract in a bill of lading against the master for not delivering goods. The goods were shipped by Orr at Newry; Orr transmitted the bill of lading to Anderson. The form of the bill of lading is not given in the report, but it seems to have stated that the goods were shipped by Orr, deliverable to Anderson or assigns. The Court decided, after examining the correspondence, that there was an express appropriation of the goods to Anderson at the time of shipment, so that Anderson had a special property in them the instant they were put on board (b). The objection was then taken, that though Anderson might maintain trover, he was no party to the contract, but the Common Pleas said that there was no weight in the objection, as they considered that Orr, in shipping the goods, acted as agent for Anderson (c).

But though it seems perfectly well ascertained that the assignment of a bill of lading does not, apart from the statute (d), transfer the contract, and has no other effect on the contract than that of appointing the person who is to receive the possession of the goods under it, the effect of the assignment of the bill of lading upon the property in the

(a) *Anderson v. Clarke*, 2 Bing. 20.

(b) See *per* Parke, B., in *Bryans v. Nix*, 4 M. & W. 788, 792.

(c) See Smith's Law of Contracts, Lecture X., for the adoption by the principal of the agent's contract.

(d) *Ante*, p. 422.

goods is a different matter. There was at one time an extreme difference of judicial opinion upon the subject, but the authorities now seem to establish that the mere assignment of the bill of lading does not confer on the assignee any legal right either of property or possession in the goods. It confers upon him an authority to receive the goods, and that authority may, as a matter of evidence, go very far to show that the person who has got it has also acquired a right of property and possession in the goods; but unless there be such a bargain as would, independently of the assignment of the bill of lading, give an interest in the goods, the assignee of the bill acquires no interest in the goods, and consequently cannot maintain any action in his own name for any injury done to them. When, however, the bill of lading is assigned in *bond fide* furtherance of a contract conferring an interest in the goods for a valuable consideration, it has (at least so far as regards the question of stoppage *in transitu*) the same effect at law that an actual delivery of the goods would have had. The transfer of a bill of lading has the same effect in defeating the unpaid seller's right to stop *in transitu* as the actual delivery of the goods themselves under the same circumstances (a). The indorsement by a mere holder, or a finder, or a thief, would transfer no interest.

The law upon the subject must chiefly be taken from the authorities subsequent to the great case of *Lickbarrow v. Mason* (b), which commenced in 1787, and which was settled in 1794, for though that case can scarcely be considered as decided at all, the elaborate arguments on both sides by all the Judges make it the origin of the law.

The cases before it, on the subject of bills of lading, were but few. In *Lickbarrow v. Mason* (b), Mr. Justice Buller

(a) *Per* Blackburn, J., in *Cole v. North Western Bank*, in 1875, 44 L. J. C. P. 237; 10 C. P. 363; see also *Gurney v. Behrend*, 23 L. J. Q. B. 265; 3 E. & B. 634.

(b) *Lickbarrow v. Mason*: this case was firstly tried in the King's Bench in 1787, 2 T. R. 63. It was then reversed in the Exchequer Chamber in 1790, 1 H. Bl. 357. And the judgment of the Exchequer Chamber was reversed in the House of Lords in 1793, 6 East, 21, and a *venire de novo* awarded, *post*, p. 430. And the new trial in 1794 is reported in 5 T. R. 683. A writ of error was again brought, but subsequently abandoned,

entertained a very strong opinion that the transfer of a bill of lading operated as a transfer of an absolute legal property in the goods, but the law now is that the assignment of a bill of lading, either by way of sale or pledge, in furtherance of a bargain to transfer an interest in the goods, by one who has an interest in them, or authority to act for one who has (and this authority may be express or obtained under the Factors Acts), for valuable consideration, and *bonâ fide* without notice to the party taking it, of a better title, destroys the unpaid seller's right, to the extent of that interest, to stop the goods *in transitu* as effectually as if the goods had been actually delivered.

In *Caldwell v. Ball* (a), in 1786, sugar was shipped in Jamaica by Thompson. The defendant, who was master of the ship, signed, as usual, three bills of lading. The first signed was to deliver the goods to Fairbrother, or his assigns, the other two were to deliver the goods to order or assigns. The first bill of lading was sent by Thompson, who was the owner of the goods, to Fairbrother, who was his London correspondent. Then Thompson pledged the goods in Jamaica to France and Co., and indorsed the bills of lading to them. Fairbrother, in London, afterwards indorsed the bill of lading in his possession to the plaintiffs, who besides having some ground for claiming an equitable lien on the goods, on account of former transactions, had also made advances on the bill of lading. The defendant delivered the goods to the representatives of the Jamaica pledgee. The plaintiffs brought trover against him, and the defendant had a verdict, which the King's Bench refused to disturb. Buller, J., said:—"The second objection was, that as there "were different bills of lading, the defendant was bound to "deliver the cargo according to the first bill of lading "actually signed. Now, as to this, the principal point, it is "material to consider the nature of a bill of lading. It is an "acknowledgment under the hand of the captain, that he has "received such goods, which he undertakes to deliver to the

(a) *Caldwell v. Ball*, 1 T. R. 205.

“person named in that bill of lading. It is assignable in its nature; and by indorsement the property is vested in the assignee. It is now clearly settled that goods at sea may be so assigned. This doctrine is laid down in *Evans v. Martlet* (a), and is recognised by Lord Mansfield in *Wright v. Campbell* (b). It is argued that the captain must be answerable at all events in this action, because he signed the first bill of lading to the order of Fairbrother, who indorsed it to the plaintiffs. I think it very material to consider who Fairbrother was. He had no interest in these goods, and he was known to all the parties to be the agent of Thompson. Then Fairbrother must be considered as Thompson himself. . . . As, therefore, this transaction is to be considered in the same light as if all the bills of lading had been made to the order of Thompson, how does the question stand as between the plaintiffs and France and Co.? Both parties claim under Thompson, but France and Co. have the first legal right, for two bills of lading were first indorsed to them, and the letter which conveyed the other bill of lading to Fairbrother, apprised him at the same time of this indorsement.”

In *Hibbert v. Carter* (c), in 1787, the plaintiff brought an action on a policy of insurance on goods shipped by him.

In the course of the trial, it appeared that previously to the making of the policy, the plaintiff had indorsed the bill of lading to a creditor, but it was not in evidence under what circumstances the indorsement was made. Buller, J., ruled that the indorsement of the bill of lading *prima facie* transferred the whole property, and therefore that on this evidence the plaintiff had no insurable interest. The King's Bench confirmed this ruling, but granted a new trial on affidavits, explaining the indorsement, and showing that it was only by way of pledge.

In the next term after this last decision, in 1787, the case

(a) *Evans v. Martlet*, 1 Ld. Raym. 271.

(b) *Wright v. Campbell*, 4 Burr. 2051.

(c) *Hibbert v. Carter*, 1 T. R. 745.

of *Lickbarrow v. Mason* (a) first came before the Court. In that case, Turing and Son shipped the goods by the order and on account of Freeman. The master of the ship signed four bills of lading to order or assigns. Turing indorsed two of the bills in blank and sent them to Freeman, and shortly afterwards drew on Freeman for the price, and he accepted the drafts. Freeman sent the bills of lading to Lickbarrow, who made him advances on the faith of them. Then Freeman failed, and his acceptances were dishonoured. Mason, as Turing's agent, succeeded in stopping the goods, and Lickbarrow brought trover against him for so doing. These facts were put upon the record in the shape of a demurrer to the evidence. The King's Bench, consisting of Ashurst, J., Buller, J., and Grose, J., gave judgment in Trinity Term, 1787, for the plaintiff. Buller, J., put his judgment on the same ground on which he seems to have acted in *Caldwell v. Ball* (b) and *Hibbert v. Carter* (c). He said: "I make the question even more general than was made at the Bar, namely, whether a bill of lading is by law a transfer of the property. . . . It has been said that no case has yet decided that a bill of lading does transfer the property, but in answer to that, it is to be observed that all the cases upon the subject—*Erans v. Martlet* (d), *Wright v. Campbell* (e), and *Caldwell v. Ball* (b)—and the universal understanding of mankind, preclude the question." Neither Ashurst, J., nor Grose, J., expresses his concurrence in this doctrine. They both put their judgment on the ground, that by giving Freeman an indorsed bill of lading, Turing clothed him with apparent authority to sell the goods. "In this case," said Ashurst, J., "the goods were transferred by the authority of the vendor, because he gave the vendee a power to transfer them; and being sold by his authority, the property is altered." And Grose, J., said:—"A bill

(a) *Lickbarrow v. Mason*, 2 T. R. 63, in the King's Bench.

(b) *Caldwell v. Ball*, 1 T. R. 216, *ante*, p. 425.

(c) *Hibbert v. Carter*, 1 T. R. 745.

(d) *Erans v. Martlet*, 1 Ld. Raym. 271.

(e) *Wright v. Campbell*, 4 Burr. 2051.

“of lading carries credit with it; the consignor by his indorsement gives credit to the bill of lading, and on the faith of that, money is advanced.”

The defendant brought a writ of error (*a*), and the Court of Exchequer Chamber, in 1790, reversed this judgment. Lord Loughborough delivered their unanimous judgment. He expressly and pointedly overruled the doctrine of Buller, J., that the indorsement of a bill of lading of itself transfers the property in the goods. He said: “The general property remains with the shipper of the goods, until he has disposed of it, by some act sufficient in law to transfer property. The indorsement of the bill of lading is simply a direction of the delivery of the goods; when this indorsement is in blank, the holder of the bill of lading may receive the goods, and his receipt will discharge the shipmaster; but the holder of the bill, if it came into his hands casually, without any just title, can acquire no property in the goods. A special indorsement defines the person appointed to receive the goods; his receipt or order would, I conceive, be a sufficient discharge to the shipmaster, and in this respect, I hold the bill to be assignable. But what is it that the indorsement of the bill of lading assigns to the holder, or the indorsee? A right to receive the goods, and to discharge the shipmaster as having performed his undertaking. . . . Bills of lading differ essentially from bills of exchange in another respect. Bills of exchange can only be used for the one given purpose, namely, to extend credit by a speedy transfer of the debt which one person owes to another, to a third person. Bills of lading may be assigned for as many different purposes as goods may be delivered. They may be indorsed by the true owner of the goods, by the freighter who acts merely as his servant; they may be indorsed to a factor to sell for the owner; they may be indorsed by the seller of the goods to the buyer; they are not drawn in any certain form; they sometimes do, and

(a) *Mason v. Lickbarrow*, 1 H. Bl. 357.

“sometimes do not, express on whose account and risk the
“goods are shipped ; they often, especially in time of war,
“express a false account and risk ; they seldom, if ever, bear
“upon the face of them any indication of the purpose of the
“indorsement. To such an instrument, so various in its use,
“it seems impossible to apply the same rules as govern the
“indorsement of bills of exchange. The silence of all
“authors treating of commercial law, is a strong argument
“that no general usage has made them negotiable as bills
“of exchange. . . . The conclusions which follow from
“this reasoning, if it be just, are—1st. That an order to
“direct the delivery of goods indorsed on a bill of lading, is
“not equivalent to, or even analogous to, the assignment of
“an order to pay money by the indorsement of a bill of
“exchange. 2nd. That the negotiability of bills and pro-
“missory notes is founded on the custom of merchants and
“positive law ; but as there is no positive law, neither can any
“custom of merchants apply to such an instrument as a bill of
“lading. 3rd. That it is, therefore, not negotiable as a bill,
“but assignable, and passes such right, and no better, as the
“person assigning had in it. This last proposition I confirm
“by the consideration, that actual delivery of the goods does
“not itself transfer an absolute ownership in them, without a
“title of property, and that the indorsement of the bill of
“lading, as it cannot in any case transfer more right than the
“actual delivery, cannot in every case pass the property, and
“I therefore infer, that the mere indorsement can in no case
“convey an absolute property. It may, however, be said,
“that admitting an indorsement of a bill of lading does not
“in all cases import a transfer of the property of the goods
“consigned, yet where the goods, when delivered, would
“belong to the indorsee of the bill, and the indorsement
“accompanies a title of property, it ought in law to bind the
“consignor, at least with respect to the interest of third
“parties ; this argument has, I confess, a very specious
“appearance.” He combats it, however, at great length, and
with much ability and learning, and concludes by giving judg-
ment for the plaintiff in error, who was the defendant below.

This judgment was taken by a writ of error to the House of Lords (a), and in 1793 the opinions of the Judges were taken. Six of them—Eyre, C. J., Gould, J., Heath, J., Hotham, J., Perryn, B., and Thomson, B.—delivered their opinions for affirming the judgment of the Exchequer Chamber; three of them, Ashurst, J., Grose, J., and Buller, J., were for reversing it. The only one of those opinions which has been preserved is that of Buller, J. (b): he maintains that the indorsement of a bill of lading does of itself transfer the legal property, and further that the right of stoppage *in transitu* does not exist, except between the seller and the original buyer. From some expressions of Eyre, C. J., in a subsequent case, in 1796, it may be collected what his opinion was. “And here,” said he in *Haille v. Smith* (c), “the bill of lading operates as in my poor judgment it ought to operate; it operates as evidence of a change of property, and as such I have no difficulty and never had in giving it its full effect. Ninety-nine times in an hundred the indorsement of a bill of lading will be conclusive evidence of the alteration of property, without ascribing to it the effect of a legal instrument, as a bill of sale. Cases may arise in which it will be difficult to understand that such was the meaning of the parties.” What the opinions of the other five Judges in *Lickbarrow v. Mason* (d) were grounded upon must be collected from the course of subsequent decisions, or remain in doubt. The House of Lords ordered a *venire de novo*, as they were of opinion that the facts did not sufficiently appear on the record. The jury on the new trial (d), under the direction of Lord Kenyon, found a special verdict, in which in addition to the facts before stated, they found that by the custom of merchants bills of lading are negotiable and transferable, and that by such negotiation the property in the goods is transferred. The King’s Bench (e),

(a) *Lickbarrow v. Mason*, 6 East, 21.

(b) 6 East, 21, n.

(c) *Haille v. Smith*, 1 B. & P. 570.

(d) *Lickbarrow v. Mason*, 5 T. R. 683.

(e) 5 T. R. 683.

in 1794, without argument gave judgment for the plaintiff, in order that the case might be taken to the House of Lords, but the defendant submitted and did not take the case into error.

As far as the opinions of the Judges can be ascertained (a), they were eight to four in favour of the defendant; but it is probable that the finding of the jury of the custom of merchants had great weight; at all events, it was always after *Lickbarrow v. Mason* (b) considered as settled law that a *bona fide* purchaser of an interest in goods, by taking an assignment of a bill of lading in furtherance of that purchase, rendered his interest indefeasible by the consignor's stoppage *in transitu*. But the decisions subsequent to *Lickbarrow v. Mason* showed that the holder of a bill of lading, if he had no interest in the goods, nor authority from the real owner to sell an interest in them, could not (in cases to which the Factors Acts did not apply) give to his indorsee any title in the goods, although the indorsee had *bona fide* given value for the indorsement of the bill of lading. In this respect, a bill of lading is unlike a bill of exchange, and can scarcely be properly called negotiable at all. An indorsement of a bill of lading does not by itself *prima facie* confer any legal right of possession on the indorsee, or anything more than an authority to receive; though an indorsement of the bill of lading in furtherance of such a bargain as of itself confers an interest in the goods, does on behalf of a *bona fide* indorsee, operate as an actual delivery of the possession would have done, and so renders that interest indefeasible by the original seller's stoppage *in transitu*. To that extent the bill of lading is negotiable, but the mere indorsement of the bill of lading, not in furtherance of a bargain, is not equivalent to a delivery of possession, even as against a wrong-doer. If this be a correct view of the subsequent authorities, they show that

(a) Six to three in the House of Lords, and Lord Loughborough and Wilson, J., who concurred in the judgment of the Exchequer Chamber, against Lord Kenyon, who was a party to the second judgment of the King's Bench.

(b) *Lickbarrow v. Mason*, 5 T. R. 683.

most of the positions for which Buller, J., contended, in *Lickbarrow v. Mason* (a), were overruled in that case; and it is very important that this should be clearly stated, for the very great ability of his opinion, and the prominent way in which it is reported, cause it frequently to be taken as the judgment of the House of Lords in *Lickbarrow v. Mason* (a).

Coxe v. Harden (b), in 1803, is the first reported case on the subject, after the final decision of *Lickbarrow v. Mason* (a). In this case a mere indorsee brought trover in his own name. There the unpaid sellers, Browne and Co., indorsed the bill of lading to Coxe their agent, for the purpose of stopping the goods *in transitu*. Coxe brought trover in his own name, against a buyer of the goods who had obtained possession. The King's Bench decided the case on the ground that the *transitus* had terminated, but they expressed a strong opinion, that even if it had not, Coxe could not maintain trover in his own name. Lord Ellenborough said: "No decision of a Court of law has ever gone further than to say, that the assignment of a bill of lading by the consignees for a valuable consideration, and without notice by the party taking it of a better title, passes the property in the goods thereby assigned. But no consideration having been paid by the plaintiff in this case for such assignment, he took the bill of lading merely as agent for Browne and Co., and without any property in himself in the goods. The analogy between bills of lading and bills of exchange has been pushed in the argument beyond all warrant of authority; but I agree to the extent of the doctrine in the case of *Lickbarrow v. Mason*, that an indorsement of a bill of lading for a valuable consideration, and without notice by the indorsee of a better title, passes the property."

In *Newsom v. Thornton* (c), in 1805, the facts were that the

(a) *Lickbarrow v. Mason*, ante, p. 427. See also *Sewell v. Burdick*, in 1883, 52 L. J. Q. B. 428; 10 App. Ca. 74 at p. 100.

(b) *Coxe v. Harden*, 4 East, 211.

(c) *Newsom v. Thornton*, 6 East, 17.

plaintiffs consigned some beef to Church, as their factor, and sent him an indorsed bill of lading; he pledged the bill of lading with the defendants (who had no notice that Church was only a factor), and soon after became bankrupt. The pledgees obtained the goods, and the plaintiffs recovered a verdict in trover against them. The defendant's counsel argued before the King's Bench, that the indorsement of a bill of lading for a valuable consideration, and without notice, conveys *per se* the legal property in the goods to the indorsee. The King's Bench refused to disturb the verdict. Lord Ellenborough said: "I should be sorry if anything fell from "the Court which weakened the authority of *Lickbarrow v. Mason*, as to the right of a vendee to pass the property "of goods *in transitu* by indorsement of the bill of lading to "a *bonâ fide* holder for a valuable consideration, and without "notice. . . . This was a direct pledge of the bill of lading, "and not intended by the parties as a sale. A bill of lading, "indeed, shall pass the property upon a *bonâ fide* indorsement "and delivery, where it is intended so to operate, in the "same manner as a direct delivery of the goods themselves "would do if so intended, but it cannot operate further. . . .

"I consider the indorsement of a bill of lading, apart from "all fraud, as giving the indorsee an irrevocable uncounter- "mandable right to receive the goods, that is, where it is "meant to be dealt with as an assignment of the property in "the goods, but not where it is only meant as a deposit by "one who had no authority to do so." Lawrence, J., said: "In the case of *Lickbarrow v. Mason*, some of the Judges "did indeed liken a bill of lading to a bill of exchange, and "consider that the indorsement of the one did convey the "property in the goods in the same manner as the indorse- "ment of the other conveyed the sum for which it is drawn; "but when the case was before the Exchequer Chamber, "there was much argument to show, that in itself the in- "dorsement of a bill of lading was no transfer of the pro- "perty, though it might operate as such, in the same manner "as other instruments may be evidence of the transfer of "property; as if goods be sold by a merchant abroad to his

“correspondent here, and the bill of lading be sent to him, “indorsed, to deliver the goods to the vendee or his order; “there the transfer of the goods may be evidenced by such “indorsement; and if the vendee part with the property in “the goods whilst they are yet *in transitu*, and before his “property in them is divested by the vendor’s stopping them “*in transitu*, and which assignment of the vendee’s property “may be evidenced in like manner by his indorsement to “another, then, according to *Lickbarrow v. Mason*, the “original vendor’s right to stop them *in transitu* would be “divested; therefore, all that that case seems to have “decided, is, that where the property in the goods passed to “a vendee, subject only to be divested by the vendor’s right “to stop them *in transitu*, such right must be exercised, if “at all, before the vendee has parted with the property to “another for a valuable consideration, and *bonâ fide*, and by “the indorsement of the bill of lading, given him a right to “recover them.”

In the case of *Patten v. Thompson (a)*, in 1816, the whole Court of King’s Bench agreed, that the mere indorsement of a bill of lading by the consignee did not divest the right to stop *in transitu*, unless it accompanied a bargain to give an interest in the goods, but they differed a little as to what was a sufficient agreement to give an interest. In that case, the plaintiffs sold to a Dublin house a cargo of goods shipped for Liverpool, sent them the bills of lading, and drew upon them for the price. The Dublin house had extensive transactions with a Liverpool house, they drew several drafts on the Liverpool house about this time, and wrote them a letter, in which they mentioned their having done so, and also inclosed them the indorsed bill of lading of the goods sold them by the plaintiffs, and requested the Liverpool house to insure them on behalf of the Dublin house; but there was nothing in the letters showing any intention to appropriate the bill of lading, specifically as a security for any of the drafts. The Liverpool house made the insurance,

(a) *Patten v. Thompson*, 5 M. & S. 350.

and accepted the drafts. Before the ship arrived at Liverpool, the Dublin and Liverpool houses both failed, the plaintiffs stopped the goods *in transitu*, and then the assignees of the Liverpool house seized and sold them. The plaintiffs brought trover against them for so doing. It appeared that the Liverpool house were factors for the Dublin house, and that at the time of the failure, the balance of the account was in favour of Liverpool, but in consequence of the dishonour of many acceptances for which they had credit, the balance before the trial turned the other way. Lord Ellenborough thought that the fact showed that the bills of lading were indorsed to the Liverpool house, as factors, but without any agreement to give them a security on these goods, either for the specific drafts, or for their general balance. If the goods had come to the hands of the factors, they would have had a lien, but there was no bargain that they should come to their hands, and he held, that the assignment of the bill of lading, under such circumstances, did not divest the rights. Abbott, J., expressed great doubts as to whether the transaction did not amount to a pledge of the bill of lading, but he thought that the bankruptcy of the pledgees and the dishonour of the acceptances put an end to the pledge. In either point of view, the case is a distinct authority, that the indorsement of a bill of lading is not equivalent to a delivery of possession; for if the goods had been delivered to the Liverpool house, at the time the bill of lading came to their hands, the plaintiff's case would have been at an end.

In the case of *Morison v. Gray* (a), in 1824, the Common Pleas decided that an indorsement of a bill of lading made by the seller to his agent, without any value, and for the sole purpose of enabling him to stop *in transitu*, conferred on the agent a special property sufficient to enable him to maintain trover in his own name. This decision is contrary to the opinion of the King's Bench in *Coze v. Harden* (b), and also

(a) *Morison v. Gray*, 2 Bing. 260.

(b) *Coze v. Harden*, 4 East, 211, ante, p. 156.

to the strongly expressed dicta of Lord Ellenborough in *Waring v. Coxe* (a), in 1808, in which the plaintiff's counsel argued that the indorsee must be taken to have the legal property of the goods. Lord Ellenborough said: "I am decidedly of opinion, that without value he has not. No case has gone so far as to decide that a bill of lading is transferable like a bill of exchange, and that the mere signature of the person entitled to the delivery of the goods *prima facie* passes the property in them to the indorsee. Much confusion has arisen from similitudinary reasoning upon this subject. There must be value upon the indorsement of a bill of lading, or no property in the goods is thereby transferred. The right to stop the goods *in transitu* is a personal right of the seller, and cannot be thus assigned to another. In this case the action, if maintainable at all, should have been brought, not in the name of the agent, but the consignor himself." This opinion was not necessary to decide the case of *Waring v. Coxe* (a), but it is the opinion of a very great Judge. It is now expressly provided by section 38 (2) of the Sale of Goods Act, however, that the term "seller" includes an agent of the seller to whom the bill of lading is indorsed.

In *Gurney v. Behrend* (b), in 1854, Behrend and Co. of Dantzic contracted to sell a cargo of wheat to Werthemann, who turned out to be the agent of one Priess. Behrend and Co. took the bill of lading to order or assigns, indorsed it in blank, and, agreeably to Werthemann's instructions, sent it to Collmann and Stolterfoht, and drew on them for the price. Behrend and Co. sent the drafts to their agents in London, who left them with Collmann and Stolterfoht for acceptance. The drafts were returned dishonoured, and Behrend and Co. took possession of the cargo when it arrived. Priess had in the meantime obtained the bill of lading from Collmann and Stolterfoht, but there was no evidence as to the way in which he had done so. He had then pledged it with a firm, who

(a) *Waring v. Coxe*, 1 Camp. 369.

(b) *Gurney v. Behrend*, 23 L. J. Q. B. 265; 3 E. & B. 622.

had in turn pledged it with the plaintiffs. The real question was whether Priess had obtained the bill of lading under such circumstances as to be able to confer a good title on a *bonâ fide* transferee. The Court came to the conclusion that the property in the wheat had passed to the buyer when the bill of lading was sent to Collmann and Stolterfoht, and that they had authority to part with the bill of lading before accepting the bills, and that they had handed it to Priess, who could therefore give a good title to his transferee.

In *Schuster v. McKellar* (a), in 1857, where the sellers allowed the buyers' lighterman to get possession of goods on the understanding that the lighterman, after putting the goods on board ship, would bring the mate's receipts to them (the sellers), who would hold them until they received payment and then hand them to the buyers to enable them to have the bill of lading made out in their own names, the buyers fraudulently procured the bill of lading to be signed, without paying for the goods, and indorsed it to a bank as security for an advance.

This action was by the sellers against the shipowners for refusing to deliver up the goods. The Court sustained the verdict for the plaintiffs.

In *Pease v. Gloaher* (b), in 1866, the buyer accepted a bill for the goods and had the bill of lading indorsed and delivered to him, and afterwards, in consequence of a conversation, delivered it back to the seller's agent. Two days after that he obtained possession of it again by a false representation and indorsed it to his bankers, to whom he was indebted. He became insolvent, and the seller stopped the goods *in transitu*, and the Court held that his rights to stop the goods as against the bankers was gone.

The property was in the buyer before, and at the time when he fraudulently obtained possession of the bill of lading. He acquired nothing by the fraud but the means of disposing of that which was already his own. It was not therefore a

(a) *Schuster v. McKellar*, 26 L. J. Q. B. 281; 7 E. & B. 704.

(b) *Pease v. Gloaher*, 35 L. J. P. C. 66; L. R. 1 P. C. 219.

case in which a buyer sought to give a greater title to goods than he himself possessed, as in *Cundy v. Lindsay* (a).

In *Coventry v. Gladstone* (b), in 1867, Gillander and Co. consigned linseed from Calcutta to London, sending an invoice to Waite, the buyer, and a bill of lading together with a draft on Waite to Gladstone and Co., the defendants. On the receipt of the invoice, Waite called on the defendants at their office, and there met one of the defendants' clerks, who gave Waite the bill of exchange drawn against the linseed for his acceptance, and by mistake handed him the bill of lading indorsed by Gillander and Co. in blank which was pinned to the draft. Waite accepted the draft, took away the bill of lading and pledged it with the plaintiffs. The defendants contended that Waite had obtained the bill of lading by a mistake and without any authority from them or intention on their part to give him possession, and relied on the dictum of Campbell, C. J., in *Gurney v. Behrend* (c), but Sir W. Page Wood, V.-C., gave judgment for the plaintiffs, holding that the defendants had full authority to deliver the bill of lading to Waite, and that it was in the hands of their servant for that purpose.

It is somewhat difficult to reconcile this case with Lord Campbell's dictum, for although the defendants had authority to part with the bill of lading they do not appear to have exercised it. Waite's position was much the same as if he had seen the bill of lading on the defendants' counter and taken it away without their knowledge or consent.

From the case of *Rodger v. Comptoir d'Escompte* (d), in 1869, it was thought that where a bill of lading was assigned in consideration of a pre-existing debt, the consideration was insufficient to defeat an unpaid seller's right to stop *in transitu*, but the contrary was decided to be the law in *Leask v. Scott* (e), in 1877, in the Court of Appeal, where a past

(a) *Cundy v. Lindsay*, 47 L. J. Q. B. 481 ; 3 App. Ca. 459, *ante*, p. 177.

(b) *Coventry v. Gladstone*, 37 L. J. Ch. 30 ; L. R. 4 Eq. 493.

(c) *Gurney v. Behrend*, 23 L. J. Q. B. 265 ; 3 E. & B. 634, *ante*, p. 436.

(d) *Rodger v. Comptoir d'Escompte*, 38 L. J. P. C. 30 ; L. R. 2 P. C. 393.

(e) *Leask v. Scott*, 46 L. J. Q. B. 576 ; L. R. 2 Q. B. D. 376.

consideration not given at the time the bill of lading was handed over was held sufficient, and the argument that the valuable consideration must have been obtained by means of the bill of lading was disapproved of (a).

Though, in order to divest the seller's right to stop *in transitu*, the indorsement of the bill of lading must be in furtherance of a bargain to give an interest in the goods for a valuable consideration, it is not necessary that it should be a bargain to give the whole interest in the goods. *Lickbarrow v. Mason* (b) was itself a case of pledge, and yet the seller's right to stop *in transitu* was divested.

But the seller's right to stop does not extend beyond the rights which his contract with his buyer gave him. If he contracted to sell the goods for a certain sum he has a right to that sum and nothing further. As James, L. J., said in *Ex parte Falk* (c), a case of pledge, the seller can stop the equity of redemption. The pledgee or sub-buyer has the right to the goods on satisfying the seller's claim and paying the balance, if any, into the estate of the insolvent pledger or buyer.

In *Re Westzynthus* (d), in 1833, the King's Bench decided that an indorsement of the bill of lading by way of pledge terminated the seller's right of stoppage at law altogether, and so far was equivalent to an actual delivery to the pledgee; but from the shape in which the question came before the Judges, they were able to decide on questions of equity, and they decided that the stoppage *in transitu* so far as regarded the interest remaining in the buyer was good in equity, and that consequently the unpaid seller acquired by his stoppage *in transitu* a right to the surplus of the proceeds of the goods after the pledgee's advances had been paid off; and that he acquired also an equity to oblige the pledgee to pay himself, out of other securities in his hands, which were the absolute property of the insolvent, as far as they

(a) See also *Chartered Bank of India v. Henderson*, L. R. 5 P. C. 501.

(b) *Lickbarrow v. Mason*, *ante*, p. 427.

(c) *Ex parte Falk*, 14 Ch. D. 452.

(d) *Re Westzynthus*, 5 B. & Ad. 817.

would go, before resorting to the goods *quasi* stopped *in transitu* (a).

In *Spalding v. Ruding* (b), in 1843, Spalding sold wheat to Thomas, who pledged the bill of lading with Ruding for 1,000*l.*, indorsing it to him. Thomas became bankrupt, without paying for the wheat. Spalding then stopped the wheat *in transitu*, but allowed Ruding to get possession of it, giving him notice that he claimed the balance of the proceeds after Ruding had satisfied his claim for 1,000*l.* and charges; and Lord Langdale, M. R., held that he was so entitled. Ruding had claimed to hold the balance over the 1,000*l.* in satisfaction of a general balance between himself and Thomas (c).

In *Ex parte Golding, Davis and Co.* (d), in 1880, Golding and Co. sold to Knight and Son goods for 366*l.*, which Knight and Son resold to Taylor and Co. for 370*l.*: neither sum was paid; Knight and Son stopped payment, and Golding and Co. stopped the goods *in transitu*. It was held in the Court of Appeal that the trustee in bankruptcy of Knight and Son was entitled to the difference between those two sums, and Golding and Co. to the 366*l.*

And in *Ex parte Falk, In re Kiell* (e), in the Court of Appeal in 1880, reported in the House of Lords as *Kemp v. Falk* (f), in 1882, Kiell purchased salt from Falk to be shipped at Liverpool for Calcutta; Kiell gave his acceptance for the price, and the bill of lading was handed to him and indorsed by him to the Bank of Scotland for an advance. Wiseman, Mitchell and Co., who acted in this matter as Kiell's agents in Calcutta, sold the salt "to arrive" to various sub-buyers. The salt arrived at Calcutta on the 29th of July, and on the 30th, Wiseman, Mitchell and Co., to whom the Bank of

(a) See on Marshalling Securities, *Broadbent v. Barlow*, 3 De Gex, F. & J. 570; *Ex p. Alston, In re Holland*, 4 Ch. App. 168, in 1868; *Ex p. Salting, In re Stratton*, 25 Ch. D. 148, in 1883.

(b) *Spalding v. Ruding*, 6 Beav. 376.

(c) *Coventry v. Gladstone*, in 1868, 37 L. J. Ch. 492; 6 Eq. 44.

(d) *Ex p. Golding, Davis and Co.*, 13 Ch. D. 628.

(e) *Ex p. Falk*, 14 Ch. D. 446.

(f) *Kemp v. Falk*, 7 App. Ca. 573.

Scotland had forwarded the bill of lading, presented it to the shipowner's agents and received in exchange delivery orders for the whole cargo. Neither the shipowner's agents, nor Wiseman, Mitchell and Co. gave delivery orders to the sub-buyers; but the arrangement was that the sub-buyers should obtain delivery on producing to the captain receipts for the money paid by them in respect of their sub-purchases. Delivery over the ship's side commenced on the 3rd of August, but only a very insignificant amount had been delivered up to the 5th. Falk having heard of Kiell's insolvency, served on the 27th of July the shipowners in Liverpool with a notice to stop the salt *in transitu*. On the 31st of July the shipowners telegraphed to the agents in Calcutta to stop it, and on the 2nd of August Falk telegraphed to the same effect to his agents. The cargo was delivered to the sub-buyers, and the proceeds remitted to the Bank of Scotland, who, after deducting their advance, paid the balance to Kiell's trustee. The balance was less than Kiell's dishonoured acceptance, and Falk claimed it. Both the Court of Appeal and the House of Lords held his claim to be good. Falk's rights as against the sub-buyers, even if they had paid their money, were not affected by his pledge of the bill of lading to the Bank of Scotland, and he could assert those rights against the goods or their equivalent, the purchase-money, provided he stopped the goods before they had been delivered; and he had done so in this case.

The transfer of the bill of lading, in order to defeat the unpaid seller's right to stop *in transitu*, must not only be made for a valuable consideration, but it must be made fairly, and without the person who takes the transfer being aware of such circumstances as prevent the assignment from being fair and honest. But the transfer is not unfair merely because it has the effect of divesting the unpaid seller's rights; and therefore in *Cuming v. Brown*(a), in 1808, where Jean, the seller of goods, consigned them to Maine, the buyer, and sent him the bills of lading, and drew on

(a) *Cuming v. Brown*, 9 East, 506.

him for the price, and then Maine pledged the bill of lading to Cuming, who at the time was aware of the facts, but did not know that Maine was insolvent, it was decided that the seller's right to stop *in transitu* was gone, and that Cuming might maintain trover for the goods against the defendant, who in obedience to the seller (Jean) had stopped the goods after Maine failed. Lord Ellenborough said the question was, whether the indorsee took the bill without notice, but he said: "This expression is not to be understood in the "restrained sense contended for, viz., without notice that "the goods had not been paid for, but without notice of such "circumstances as rendered the bill of lading not fairly and "honestly assignable. The criterion being, according to "Buller, J., in *Salomons v. Nissen* (a), does the purchaser "take it fairly and honestly? And so understanding that "expression, or at any rate understanding the rule of law "on the subject, we think that in this case no circumstance "appears to have existed at the time of the assignment of "this bill of lading, which should have prevented the plaintiff "from taking it, or which should now render it not available "in his hands."

In *Gilbert v. Guignon* (b), in 1872, Forbes and Co., merchants in California, agreed to ship a large quantity of corn to Kemp, a miller in Devonshire, payment at sixty days' sight against bill of lading. They shipped a cargo of wheat for him at the price of 5,625*l.*, taking six bills of lading, and drawing six corresponding bills of exchange on Kemp each for 5,625*l.* On the 12th of September they pledged three indorsed bills of lading together with three of the drafts with the Bank of British Columbia, the nominal defendants, and on the same day, but, as the evidence showed, by mistake they sent to Kemp, together with the invoice, one of the other bills of lading indorsed in blank, which Kemp on the 11th of October pledged with the West of England Banking Company, the plaintiffs. The three bills were presented to

(a) *Salomons v. Nissen*, 2 T. R. 674.

(b) *Gilbert v. Guignon*, 8 Ch. App. 16.

Kemp with the bills of lading attached, and were accepted by him but dishonoured. The Bank of British Columbia then obtained possession of the cargo on the receipt of an indemnity from Forbes and Co. The West of England Banking Company claimed the cargo, alleging that they were the first indorsees of one of a set of bills of lading, and that the Bank of British Columbia had notice at the time of the pledge that Forbes and Co. had parted with the control of the cargo. The judgment of Lord Selborne, L. C., is not reported verbatim, but his Lordship dismissed the plaintiffs' appeal on the ground that Forbes and Co.'s inadvertence had not been the means of deceiving them.

Nor is the indorsee for value affected by any equity arising out of the agreement between the original seller and the indorser, of which he has no notice; thus, in *Henderson v. The Comptoir d'Escompte de Paris* (a), in 1873, the plaintiff shipped goods to Lyall, Still and Co., who were to sell them and appropriate the proceeds to meet his draft against the goods; instead of doing so, Lyall, Still and Co. indorsed the bill of lading to the defendants to whom they were indebted. The plaintiffs sought to have it declared that the defendants held the proceeds of the sale of the goods in trust for them, but the Privy Council dismissed the plaintiff's appeal.

In the case of *Meyerstein v. Barber* (b), in the House of Lords, in 1870, the rights between each other of *bonâ fide* pledgees of bills of lading in three parts were discussed. Cotton had been consigned to London under a bill of lading, making it deliverable to the shipper or assigns on payment of freight, and bills of exchange drawn against it had been discounted by the Chartered Bank of India, who held the bill of lading as security. The cotton arrived in London, and Abraham, who had succeeded the consignees in their business, had the goods landed at a sufferance wharf and entered in his

(a) *Henderson v. The Comptoir d'Escompte de Paris*, 42 L. J. P. C. 60; L. R. 5 P. C. 253.

(b) *Meyerstein v. Barber*, 36 L. J. C. P. 48, 289; 39 L. J. C. P. 187; L. R. 2 C. P. 38, 661; 4 E. & I. App. 317.

name in the wharfinger's books as importer, where they lay under a stop for unpaid freight.

On the 4th of March Abraham obtained the bill of lading from the Chartered Bank, giving his cheque for it (a), and pledged it with the plaintiffs for an advance of 2,500*l.*, the plaintiffs asked for the "other" copy, and Abraham promised to send it to them, and did send the second copy later on. On the 6th and 7th of May he pledged the third copy with the defendants, who subsequently obtained possession of the cotton. Both the plaintiffs and the defendants were pledgees for value without any notice of Abraham's fraud. One question was whether there could be a valid pledge of goods lying in a warehouse where the pledgee neither obtained a warrant nor actual delivery (b). The plaintiffs obtained a verdict, and the Court of Common Pleas held that the bill of lading held by the plaintiffs was the symbol of property in the cotton, and its delivery to the plaintiffs operated as a delivery of the cotton itself. Erle, C. J., said the bill of lading at the date of the first pledge was not extinct, for although the cotton had been landed, it had not been delivered according to the bill of lading, and "if Abraham had given a delivery order "without the bill of lading, the wharfinger, as I read the "evidence, would not have obeyed it but would have with- "held the cotton until the bill of lading was produced." Willes, J., said: "I think the bill of lading remains in force "at least so long as complete delivery of possession of the "goods has not been made to some person having a right to "claim them under it." This judgment was affirmed in the Court of Exchequer Chamber and in the House of Lords, where Lord Westbury's judgment is highly instructive. He said (c): "There can be no doubt, therefore, that the first "person who for value gets the transfer of a bill of lading, "though it be only one of a set of three bills, acquires the "property; and all subsequent dealings with the other two "bills must in law be subordinate to that first one, and for

(a) See 2 C. P. 47.

(b) See Willes, J.'s judgment, 36 L. J. C. P. 57; L. R. 2 C. P. 52.

(c) 39 L. J. C. P. 195; 4 E. & I. App. 335.

“this reason, because the property is in the person who first
“gets a transfer of the bill of lading. It might possibly
“happen that the shipowner having no notice of the dealing
“with the bill of lading, may, on the second bill being
“presented by another party, be justified in delivering the
“goods to that party. But although that may be a dis-
“charge to the shipowner, it will in no respect affect the legal
“ownership of the goods, for the legal ownership of the
“goods must still remain in the first holder for value of
“the bill of lading, because he had the legal right in the
“property.”

On the subject of the carrier's liability see the judgment of Dr. Lushington in the *Tigress* (a), which Mr. Benjamin seems to consider doubtful law (b), and the remarks of Lord Westbury in the case of *Meyerstein v. Barber* (c).

In *Glyn, Mills and Co. v. The East and West India Dock Co.* (d), in the House of Lords in 1882, Cottam, Morton and Co., as consignees of sugar and holders of the bill of lading in three parts, making the sugar deliverable to themselves or their assigns, applied to and obtained from the plaintiffs an advance on depositing as security the first of the set of bills. The sugar arrived, and Cottam, Morton and Co. entered the goods at the Custom House, and the captain landed the goods with the defendants under a stop for freight. Cottam and Co. handed the defendants another of the set of bills, and the defendants then entered the sugar in their books in the name of Cottam and Co. The freight was subsequently paid, and Williams and Co. obtained possession of the sugar under an order from Cottam and Co. Cottam and Co. then became insolvent, and this action was brought by the plaintiffs as indorsees for value for an alleged conversion of the goods. The case was tried before Field, J. (e), in 1880, who gave a judgment for the plaintiffs which was reversed by the

(a) *The Tigress*, 32 L. J. Ad. 97.

(b) Benjamin on Sale, 5th ed., p. 912.

(c) *Meyerstein v. Barber*, 39 L. J. C. P. 195; 4 E. & I. App. 336.

(d) *Glyn v. The East and West India Dock Co.*, 49 L. J. Q. B. 303; 50 L. J. Q. B. 62; 52 L. J. Q. B. 146; 5 Q. B. D. 129; 6 Q. B. D. 475; 7 App. Ca. 591.

(e) 49 L. J. Q. B. 303; 5 Q. B. D. 129.

majority of Judges in the Court of Appeal (*a*), Brett, L. J., being of opinion that that judgment should be affirmed, Bramwell and Baggallay, L. JJ., being of a contrary opinion. And the House of Lords (*b*) affirmed the Court of Appeal. Bramwell, L. J., said, "In my opinion, in such cases as these "as a rule, where there are no special circumstances, a warehouseman receives the goods from the ship or ship's captain "on the terms of holding them for the ship till the freight is "paid, and then and thenceforth of holding them to deliver "to such person as the shipowner or captain would have been "justified in delivering them to under the bill of lading. "This is Mr. Justice Willes' opinion in *Meyerstein v. Barber* (*c*): ". . . I cannot think that the warehouseman undertakes a "different duty to that of the shipowner. . . . Then would "the captain of the ship have been justified in delivering "these goods to Cottam and Co. on production of their bill of "lading and tender of the freight? I cannot bring myself to "say he would not."

The view taken by Brett, L. J., was that the defendant held the goods for, and was bound to deliver the goods to the real owner, the holder of the bill of lading, *i.e.*, the plaintiffs.

Lord Cairns said: "The dock company are under no higher "liability than the shipowner himself would have been, and "on the other hand, they are not under any lower or less "liability." This also was the view of Lord Blackburn, who added that the captain's contract is to deliver to the assignee, not of the goods, but of the bill of lading.

(*a*) 50 L. J. Q. B. 62; 6 Q. B. D. 475.

(*b*) 52 L. J. Q. B. 146; 7 App. Ca. 591.

(*c*) *Meyerstein v. Barber*, 36 L. J. C. P. 56; L. R. 2 C. P. 49.

Transitus not ended where goods in carrier's freight sheds. Right to stop not defeated by filing claim with assignee. Duty paid by assignee. In *Morgan Envelope Co. v. Boustead*, 7 O. R. 697, the goods had been consigned to James Campbell & Son, Toronto, and while they were held by the railway company the consignees assigned to the defendant, who, immediately after the assignment, passed and entered the goods and paid the duty thereon. The railway company had removed the goods from the customs warehouse to their freight sheds, where they remained. Delivery was refused to the defendant for non-production by him of a bill of lading, and the freight was not paid or tendered. The plaintiffs stopped the goods *in transitu*, but before doing so had proved their claim for the goods on the estate of James Campbell & Son. Per Armour, J.: "The entry of the goods at the custom house, and the payment of the duties thereon by the defendant, had no effect whatever upon the possession of them by the railway company, but only released them from the exercise of the powers and authorities to which they had before been subject," (the powers and authorities exercisable by the officers of the customs), "and enabled the railway company to unload them and deal with them." They still remained in the hands of the railway company, as carriers.

As to the effect of the proof against the estate, Armour, J., explained that "the true nature and effect of the stoppage *in transitu* is merely to restore the goods to the possession of the seller, so as to enable him to exercise his rights as an unpaid vendor, not to rescind the sale; and I think, therefore, the plaintiffs were justified in proving their claim for the price of them, and that at all events it did not prejudice their right to stop the goods *in transitu*."

Stoppage in transitu does not revest property. This has been so clearly settled that it is perhaps superfluous to refer to the Canadian cases in point. In *Childs v. Northern Railway of Canada*, 25 U. C. Q. B. 165, in which the right of stoppage *in transitu* was upheld, it was nevertheless decided that the unpaid vendor had not the right of property and possession necessary to maintain trover against

the railway company. " This right in the vendor to withhold the goods from his vendee, who, by payment, would have an immediate right to the possession as being already the owner by sale and delivery to the carrier, is a very different thing from the right of property and possession which is asserted in the action of trover."*

As the stopper *in transitu* is merely asserting a claim for the unpaid price, if there is no unpaid price, he cannot stop the goods, and his attempt to stop must be ineffectual, no matter how timely and regular in every other regard. This seems to be the real state of the case of *McDonald v McPherson*, 12 S. C. R. 416, in which there was a dissenting opinion, both in the Supreme Court of Nova Scotia and the Supreme Court of Canada. The consignor was heavily indebted to the consignee, and had shipped goods directed to him on account of the advances by the consignee. The bill of lading made the goods deliverable to the railway agent at Pictou, and was not by him endorsed, but it was endorsed by the consignee to the plaintiff for accommodation acceptances. The consignor notified the railway agent at Pictou to stop the goods, and he in turn notified the agent at Halifax; but he took no further interest in the matter and set up no right. It was held that the plaintiff was entitled to the goods, and the defendant, the railway agent at Halifax, was a mere wrong-doer.

Sufficiency of the notice to stop in transitu. The notice to the carrier, in order to be effective as a stoppage *in transitu*, should be sufficiently specific. In *Clementson et al v. Grand Trunk Railway*, 42 U. C. R. 263, it was in these terms: " Do not deliver earthenware from our English house to W. B. Palmer & Co. Hold to our order." At that time Palmer & Co. had about four hundred pieces of goods in the warehouse of the railway company at Hamilton, and the plaintiffs' names were not on any of the papers in defendants' possession, nor were the packages so marked that they could be identified. The notice " did not specify the goods by marks, numbers, or otherwise. " The name of Clementson & Co. did not appear in the bill of lading or in any of the documents which were in the possession of the defendants; and if they were bound—

* See, however, page 418, *ante*, last paragraph; also note on page 446c.

“ which I think they were not—to know that the plaintiffs’
“ goods, which they had sold to W. B. Palmer & Co., were
“ among the fifteen packages of goods which came from
“ England by the steamer, from the mere fact that the
“ telegram mentioned ‘ earthenware from our English
“ house,’ still they were not told to stop all these fifteen
“ packages, nor how many, if less than fifteen, were to be
“ stopped, and the defendants had no means of finding out
“ definitely what they were to do. It is certain that they
“ could not be required at their own peril, upon such in-
“ sufficient instructions, to seize the whole fifteen
“ packages, nor even any particular number of them; and
“ it became far more embarrassing to them when there
“ were about 400 packages then in store for W. B. Palmer
“ & Co., many of which might, besides the fifteen, have
“ come from England by way of New York.”

Stoppage in transitu not extended by wrongful refusal to deliver. Justifiable delay distinguished. The case of *Anderson v. Fish*, 16 O. R. 476, draws the distinction between the wrongful refusal of a carrier to deliver and a delay for the purpose of making inquiries as to the party entitled to the goods. A consignment of cigars was made to a vendee in Windsor, Ontario, who afterwards assigned for the benefit of creditors. The assignee demanded the goods, and offered to pay the freight, but the agent of the railway company informed him that where the goods were not claimed by the consignee, but by an assignee, he was obliged to telegraph for instructions. He did so, but before the instructions were received the unpaid vendor gave notice, stopping the goods. Falconbridge, J., held that the *transitus* had been ended by the refusal to deliver the goods, under the English case of *Bird v. Brown*, 4 Ex. 786, But the court, Armour, J., and Street, J., Falconbridge, J., dissenting, held that in this case, as there had not been, as in *Bird v. Brown*, an unconditional refusal to deliver the goods, that case did not apply. They considered the delay for inquiries justifiable, and held that the *transitus* was not at an end.

See *Davis v. McWhirter*, 40 U. C. Q. B. 598, where Morrison, J., expresses a difficulty in reconciling the decided language in *Bird v. Brown* with other authorities.

Bill of lading in force until superseded by some other document. The bill of lading in *Clementson et al v. Grand Trunk Railway Co.* (supra), stated that the goods were to be delivered to the Grand Trunk Railway Co., and by them forwarded per railway to the station nearest to Hamilton, and at the aforesaid station delivered to W. B. Palmer & Co., or their assigns. The contention was made that the endorsement of this bill of lading was of no effect to defeat the right of stoppage *in transitu*, because its purpose had been answered by the landing of the goods, and it no longer had operation as a symbol of property. But it was held, citing *Meyerstein v. Barber*, L. R. 2 C. P. 38, that the ocean and inland carriage were covered by the document, and that it remained in force until superseded by some other document, or by the performance of its conditions. 42 U. C. Q. B. 263.

Right of stoppage not defeated by attachment, nor by condition in shipping bill terminating carrier's liability when goods warehoused. In *McLean v. Breithaupt*, 12 Ont. A. R. 383, the shipping bill contained a provision that in all cases the delivery of the goods would be considered complete and the responsibilities of the carrier at an end when the goods were placed in the company's warehouse; that the warehousing of them would be at the owner's risk, who was then liable for the charges for storing them. While the goods remained in the company's warehouse at their destination, the purchaser requested the station agent that they should be kept for him by the company until he could find time to remove them, and asked him not to charge storage; but the agent made no promise. Hagarty, C.J.O., had some doubt about the matter, but concurred in the result, which was that the *transitus* had not ceased. Burton, J.A., stated the principle as laid down in *ex parte Rosevear Clay Co.*, 11 Ch. D. 560, and pointed out that, under the cases a mere promise by the carrier to the purchaser, that he would deliver the goods to him as soon as they could be got out, would not be enough to change the possession. Here there was no promise, even putting aside the question of the agent's authority to make a contract on behalf of the railway company. The condition terminating the liability of the carrier was a contract with the vendor, not with the

purchaser, and nothing had occurred to effect a transfer of the actual possession. The attachment of the goods by a creditor of the purchaser did not affect the matter. The lien of the unpaid vendor, as decided in *Smith v. Goss*, 1 Camp. 382, was "the elder and preferable lien."

Does Trover lie for goods stopped in transitu. It was decided by the Court of Queen's Bench in Ontario that although the vendees of goods were insolvent, and notice had been duly given to the carrier, stopping the goods *in transitu*, the vendors could not maintain trover, the right in the vendor to hold the goods from his vendee being a very different thing from the right of property and of possession, which is asserted in an action of trover. It was conceded that the carrier had done wrong in delivering the goods to the purchaser after the notice. This case, *Childs et al. v. Northern Railway of Canada*, 25 U. C. R. 165, was decided in 1866, but in 1816 it had been decided, in *Litt et al. v. Cowley et al.*, 7 Taunt., 169, that trover would lie against a carrier who delivered the goods after a stoppage *in transitu*, and it is stated in the text, *ante* at p. 415, that trover will lie against the assignee of the bankrupt purchaser who gets possession of the goods.

Goods in Railway Company's bonded warehouse. Notice to Company Sufficient. In *Ascher v. The Grand Trunk Railway*, 36 U. C. R. 609, goods which came from Montreal in bond were deposited in the customs warehouse at the Grand Trunk Railway Station at Toronto. The consignees became insolvent, and the consignors gave notice of stoppage *in transitu* to the railway company, after which the agent of the company gave an order for delivery on payment of the charges to another person, who made the entry and received them from the customs. It was held that the notice to the company was sufficient, though it was advisable in such cases to give notice also to the customs officer, and that an action would lie against the company for such delivery.

Goods claimed by assignee of bankrupt purchaser stopped in transitu, after claim but before delivery. In *Anderson v. Fish et al.*, 16 O.R. 476, the vendors had shipped goods over the Grand Trunk Railway, and on the arrival of the goods the agent of the railway company sent an

advice notice to the vendee, who refused to take it. After this the vendee assigned to the plaintiff for the benefit of creditors, and the assignee produced the assignment to the railway company's agent, demanding the goods, and offering to pay the freight. The agent did not refuse to deliver the goods to him, but informed him that in such cases his duty was to telegraph the company's solicitor for instructions. He did so, but before he received an answer, the defendants, as unpaid vendors, notified the agent not to deliver the goods to the vendee or his assignee, claiming the right to stop them *in transitu*. Armour, C.J., said that the demand, or more properly the claim, made by the assignee upon the railway agent for the goods did not prevent the exercise of the right of stoppage *in transitu*, for there was no absolute refusal to deliver the goods, but only a refusal to deliver them until such time as he could, in obedience to the rule of the railway company, obtain the instructions of the railway company's solicitor as to the course to be pursued by him with respect to the goods. This rule of the company was a perfectly reasonable and proper one, and the obedience of the railway agent to it was lawful, and did not have the effect of making the detention of the goods until he could communicate with the solicitor and receive his instructions, wrongful, nor did it have the effect of altering the character of the possession which the railway company has as carriers of the said goods. Falconbridge, J., dissented, on the ground that the logical result of the judgment was to place it in the power of the carrier or his local agent practically to decide to whom the goods should belong by prolonging the period of *transitus* after they had been demanded, with every formality, including the tender of expenses, etc. The judgment of the majority was, however, affirmed on appeal. 17 O. A. R. 28.

An earlier case of the *Morgan Envelope Co. v. Boustead*. 7 O. R., 697, was somewhat similar. While the goods, which had been consigned to the purchasers from Boston, were held by the railway company the purchasers assigned to the defendant for the benefit of creditors. The defendant, immediately after the assignment, passed and entered the goods and paid duty thereon, and the railway company

removed the goods from the customs warehouse to their freight sheds, where they remained, and delivery was refused to the defendant for non-production by him of a bill of lading, and the freight was not paid or tendered. The plaintiffs, as unpaid vendors, having stopped the goods *in transitu*, it was held that the transitus was not at an end, for that the railway company continued to hold the goods as carriers and not as agents for the defendant.

In *Davis v. McWhirter*, 40 U. C. Q. B. 598, it was held that the transitus was at an end when the purchaser's assignee demanded the goods from the railway company, tendering the freight, although the freight agent of the company refused to deliver the goods; but the ruling did not enable the purchaser to recover the goods, because there was evidence that convinced the court of his fraudulent intent not to pay for them, which entitled the vendor to rescind the contract and claim the goods.

Goods in custom-house store; end of transitus. The vendors in New York consigned goods to Fahey at Kingston, where they duly arrived. Being liable for duties, they were taken in charge by the custom-house officers and placed in the custom-house store, no entry being made nor duties paid. Fahey paid duties on part of the goods and took them away, but the residue remained until after he failed to pay his note for the goods. The vendors' agent then notified the warehouse-keeper not to deliver the goods, claiming the right of stoppage *in transitu*. It was held that as to the part of the goods so remaining in the warehouse, the stoppage *in transitu* was effectual. *Burr et al. v. Wilson et al.*, 13 U. C. R. 478.

The case of *Howell et al. v. Alport*, 12 U. C. C. P. 375, is similar to the foregoing, except that the goods were placed in bonded warehouse on the purchaser's own premises, to which there were two different locks and keys, one in control of the purchaser and the other of the custom house. While the goods were so placed the purchaser became insolvent, and notice of stoppage *in transitu* was given to the custom house officer. It was held that the *transitus* was not ended, as the goods were not, under the facts stated, in the possession of the purchaser. *Lewis et al. v. Mason*, 36 U. C. R. 590, is to the same effect, except that the bond

was there given to the vendor, and in it are cited the two foregoing cases as to the effect of the goods being in the custom house, the duties being unpaid. And in *Graham et al. v. Smith*, 27 U. C. C. P. 1, it was held that the right of stoppage *in transitu* still existed in the plaintiff, though the goods were bonded in the names of the consignees, for, until the duties were paid, the goods could not be said, either actually or constructively, to have come into the possession of the consignees so as to put an end to the *transitus*.

The case of *Howell et al. v. Alport*, above mentioned, was decided in 1862 in the Common Pleas in Upper Canada, and as already stated it was there held that the right of stoppage *in transitu* was not defeated where the goods shipped from New York, in bond, to the purchaser in Belleville, Ontario, had been carted in the purchaser's teams to the bonded warehouse on the purchaser's premises, to which there were two keys, one kept by the customs officer and one by the purchaser, the bonded warehouse being a room opening from a room wherein the purchaser carried on his business. The use of both keys was required to open the door. The customs paid no rent for the room, and the purchaser was entitled to charge storage upon the goods kept there. The purchaser sold part of the goods, and by permission of the messenger of the customs, the door of the bonded warehouse was opened and the goods so sold were marked for the persons to whom they were sold; but the duties were not paid, nor were any of the goods entered. The decision is founded upon the observations of Lord Campbell in *Heinekey v. Earle*, 8 E. & B. 423, that a mere delivery at the place of destination is not necessarily a termination of the transit; the transit remains until the goods have come into the possession of the consignee, and although they are landed at the place to which they are destined. "I think that unless the consignee has taken possession of them they are still in transit. . . . I think it cannot be said that these goods ceased to be *in transitu* merely because they were put on the premises of Horn ' (the consignee). ' That, I think, would not necessarily ' ' be a termination of the transit.' "

The case so decided was thoroughly considered in the later case of *Wiley et al. v Smith*, 1 O. A. R. 179, and distinctly overruled. The reasoning of Burton, J.A., is as follows: "It appears to me that the question, and the only question, in determining whether the *transitus* is ended is to ascertain in what capacity the goods are held by the person who has the custody. Is he the vendee's agent, to keep the goods, or does he hold them as agent of the carrier, or as a mere bailee or middleman, not exclusively the agent of the vendor or vendee?"

"The delivering into a warehouse, though belonging to the insolvent, but used also as a bonded warehouse, would not in itself be a delivery to him; but whenever the collector of customs recognized his title and took from him a bond for the payment of the duties at a future day, it appears to me out of the question to contend that the customs officer was a middleman, and that notice to him would operate as a stoppage *in transitu*. There was, as observed in one of the cases cited, nothing remaining to be done on the part of the vendee as between him and the vendor. All that remained to be done was between the vendee and the crown, and if the officer representing the Crown, in the exercise of his lawful authority, chooses to accept the bond of the vendee in place of the duties, it scarcely lies in the mouth of the vendors to say that the delivery is not complete." From the moment the collector of customs received the bond of the vendee, there was as complete a delivery as if the goods had been delivered into his own hands. The collector had a lien on the goods, and would be justified in detaining them until it was satisfied, but as between vendor and vendee, the goods were at home, and constructively in the possession of the purchaser, the customs authorities (subject to the payment of the duties) having by the acceptance of the bond undertaken to hold them for the use of the purchaser and subject to such order or disposition as he might choose to make.

There was a case of *Wilds et al. v. Smith* standing over to await the judgment of the Court of Appeal in *Wiley v. Smith*, and in giving judgment in the case of *Wilds v. Smith*, 41 U. C. Q. B. 136, Morrison, J., said: "While I

“ am bound to recognize the principle upon which the
“ Court of Appeal acted, I regret that the court did not
“ see its way to protect the unpaid vendor, for, although
“ the goods in one sense arrived at their destination, the
“ insolvent never had actual, or as I think, constructive,
“ possession of the goods, and could not have put his hands
“ on them until the duties were paid. With due deference,
“ therefore, it seems to me that the vendee had not better
“ possession of the goods than in the case where the carrier
“ retains possession until the freight is paid. It is true
“ that the carrier may assent to the vendor having actual
“ or constructive possession without payment of the
“ freight, but that cannot happen as respects the customs
“ lien, for, to entitle the vendee to possession, he must enter
“ the goods and pay the duties.” The Court of Appeal,
reviewing and reversing the judgment of the Queen’s Bench
in this case, held that the *transitus* was at an end. They
expressed no opinion with reference to the criticisms of
Morrison, J., if such they can be considered, of the principle
established by *Wiley v. Smith*.

The case of *Burr v. Wilson*, 13 U. C. R. 478, is referred
to in *Wiley v. Smith*, and said to have been founded
on *Northey v. Field*, 2 Esp. 613, in which the vendor had
retained a *jus disponendi* over the goods. In *Burr v. Wilson*,
there had not been any *jus disponendi* reserved,
but on the other hand the goods had not been placed in a
bonded warehouse. They were simply placed in a customs
warehouse subject to payment of duties. Part of the goods
had been entered and duties paid thereon, but this was
not held to give the purchaser constructive possession of
the whole. It was held, therefore, that the *transitus* was
not at an end, and the goods could be stopped.

The case of *Graham v. Smith*, 27 U. C. C. P. 1, is founded
on *Howell v. Alport*, and probably falls with it. The circumstances
were not precisely the same as in *Wiley v. Smith*, but they seem
to raise essentially the same point. The principle established by
the Court of Appeal appears to be that the goods are at home when
the collector of customs has taken the bond of the purchaser for the
payment of the duties in lieu of the cash payment. If that is the
principle, *Graham v. Smith* is overruled, as well as *Howell*

v. *Alport*, because in the case just named a bond had been taken, the goods having been placed in a bonded warehouse, and it was held, nevertheless, that the *transitus* was not at an end, the goods not having come into the actual possession of the purchaser.

CHAPTER II.

DOCK WARRANTS, DELIVERY ORDERS, FACTORS.

As already stated, the proviso to section 47 of the Sale of Goods Act, which substantially reproduced section 10 of the Factors Act, 1889, has the effect of putting all documents of title on the same footing as bills of lading. Such documents include dock warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, "and any other "document used in the ordinary course of business as proof "of the possession or control of goods, or authorizing or "purporting to authorize, either by indorsement or delivery, "the possessor of the document to transfer or receive "goods thereby represented" (a).

Those documents are generally written contracts, by which the holder of the indorsed document is rendered the person to whom the holder of the goods is to deliver them, and in so far they greatly resemble bills of lading; but they differ from them in this respect, that when goods are at sea the buyer who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship and requiring him to attorn to his rights; but when the goods are on land, there is no reason why the person who receives a delivery order or dock warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore.

Besides this substantial difference between them, there is

(a) Factors Act, 1889, s. 1 (4).

the more technical one that bills of lading are ancient mercantile documents which may be subject to the law merchant, whilst the other class of documents is of modern invention, and no custom of merchants relating to them has ever been established.

In *Spear v. Travers* (a), in 1815, before Gibbs, C. J., at Nisi Prius, the special jury are reported to have observed: "that in practice, the indorsed dock warrants and certificates are handed from seller to buyer as a complete transfer of the goods"; and there is no doubt that such is the fact, but the observation was no part of their verdict, and if it was meant as an expression of opinion that the transfer of the dock warrant was equivalent to a delivery of possession of the goods, it was quite irrelevant to the case before them. The facts were, that the defendants sold sugar to Meaby, and handed him the dock warrants. Meaby paid them. Then Meaby sold the sugar to Greaves, and handed him the dock warrants, and Greaves accepted drafts for the price. Then Greaves transferred the dock warrant to Spear, who advanced him 2,000*l.* on the security of it. Then Greaves failed, and his acceptances were dishonoured. The goods all this time stood in the name of the defendants, and they by a false statement to the dock company, that the original dock warrant was lost, obtained a duplicate under which they got the goods. Spear brought trover, and Gibbs, C. J., said: "I think the defendants had no right to stop the goods. They had been paid for them. This is an improper attempt on their part to assist Meaby. They have not got possession of the goods by the exercise of any right to stop *in transitu*, but by a falsehood. I am of opinion, that the plaintiff to whom the certificate was transferred for a valuable consideration, is entitled to recover." The only point decided in that case was, that Spear had a legal property sufficient as against a wrong-doer, and it is clear that a sale to him would have given him such a property if there had been no dock warrant in existence. There may, perhaps, be

(a) *Spear v. Travers*, 4 Camp. 251.

a difference as to the effect of a pledge without delivery of possession, but that distinction does not seem to have been made in *Spear v. Travers* (a).

In *Zwinger v. Samuda* (b), in 1817, the facts were, that Roebuck pledged goods lying in the docks, with Samuda, and the goods were transferred into Samuda's name. Then Roebuck sold the goods to Zwinger. Roebuck applied to Samuda for the dock warrants, and he refused to give them until he was paid off his advances. Roebuck by a false pretence (to which Zwinger was no party) got him to take a worthless cheque in payment of his advances, and to indorse the dock warrant to Zwinger, who thereupon paid Roebuck the price of the goods. As soon as Samuda discovered the trick, he countermanded the delivery order, and seized the goods. Zwinger brought trover and recovered. Sir James Allan Park, at Nisi Prius, seems to have likened the indorsement of dock warrants to that of bills of exchange, and on a motion for a new trial, he seems to have thought they were like bills of lading at least; but Burrough, J., said:—"I hope it will be understood that the Court does not proceed upon any thing like a custom in this case. . . . The defendant has been paid for the goods, for Roebuck and the defendant are one. . . . Who is it who credits Roebuck but the defendant? We therefore have the contract of sale and the payment complete, which transfer the property, and though there also exists in the case this document, what difference does it make? It does not invalidate the sale."

In *Lucas v. Dorrien* (c), in 1817, the owner of sugar pledged the dock warrants with the defendants. Some time after the pledge the defendants lodged the dock warrants which had been indorsed to them, and the company assented to the transfer. The next day the pledgor became bankrupt. His assignees brought trover. No question could arise upon the negotiability of the dock warrants, as the delivery

(a) *Spear v. Travers*, 4 Camp. 251, but see *ante*, p. 420.

(b) *Zwinger v. Samuda*, 7 Taunt. 265.

(c) *Lucas v. Dorrien*, 7 Taunt. 278.

was executed before the bankruptcy; but though the point did not arise, both Dallas, J., and Park, J., intimated an opinion that the dock warrants were negotiable by some custom of trade.

In *Keyser v. Suse* (n), in 1818, the question arose. The unpaid seller gave the buyer the dock warrants, and he transferred them by way of pledge, to Keyser the plaintiff. Before Keyser notified this transfer to the dock company, the buyer failed, and the original seller gave notice of countermand to the dock company. Keyser brought trover. Dallas, J., at Nisi Prius, intimated a strong opinion that the transfer of the dock warrant for value put an end to the seller's right to stop *in transitu*, and directed a verdict subject to leave to enter a nonsuit. The parties, however, compromised the case.

It is to be observed that these authorities amount to no more than expressions of opinion at Nisi Prius, by two learned Judges, Park, J., and Dallas, J., which are too little to establish a custom the effect of which is not to put a construction upon the intention of the parties, or the meaning of the documents of title, but to give an effect to them different from that which at common law they would have.

There does not seem to be any ground for maintaining that the seller, who has given a delivery order to a buyer from him, is thereby precluded from setting up his rights as against third parties, who may have made advances on the faith of the delivery order. He cannot set up any case inconsistent with the document which he has given to his buyer, and on which he has allowed him to get credit. He cannot therefore deny, that the person to whom he has handed the delivery order had a right to obtain possession. But this is so far from being inconsistent with the case of one who is stopping *in transitu*, that it is a necessary and essential ingredient in it. He can exercise no right to stop the goods *in transitu*, unless the buyer had a vested right both of property and possession, defeasible on his insolvency, and

it is impossible to say that the possession of a delivery order imports any thing more than this.

It is therefore submitted, that the indorsement of a delivery order, or dock warrant, has not (independently of the Factors Acts) any effect beyond that of a token of an authority to receive possession.

In *Jenkyns v. Usborne* (a), in 1844, Hunter and Coventry of London, had agreed to purchase a certain quantity of beans from Lloyd of Leghorn. Lloyd consigned to them a much larger quantity, and the plaintiff, who was Lloyd's London agent, agreed to take the excess from them and paid for it. Lloyd had made out a bill of lading for the entire quantity and sent it through the plaintiff to Hunter and Coventry, and they gave to the plaintiff a delivery order addressed to the captain for the excess quantity in these words: "Please deliver to the bearer, 1,442 $\frac{3}{4}$ sacks of beans, "ex *Agnes*, Hunter and Coventry." The plaintiff then sold the beans to Thomas, and handed him the delivery order. Thomas gave his acceptances in payment, and then pledged the order with the defendant. Thomas stopped payment, and as soon as the ship arrived the plaintiff instructed the captain not to deliver the beans. The captain delivered the beans belonging to Hunter and Coventry to them, and the remainder to the defendant. The plaintiff obtained a verdict, which was upheld. Tindal, C. J., saying, "Thomas was not in "possession of the bill of lading: he had only an order on "the captain to deliver the goods on arrival" (b).

In *Farina v. Home* (c), in 1846, the agent of a foreign consignor warehoused goods and handed the delivery warrant to the defendant, the buyer, who kept it ten months, but eventually refused to pay for the goods. The action was for goods sold and delivered, the defendant contending that there had been no delivery. At the trial the plaintiff obtained a verdict, but the Court of Exchequer granted a new trial, and Parke, B., said: "The delivery and receipt of the warrant

(a) *Jenkyns v. Usborne*, 13 L. J. C. P. 196; 7 M. & G. 678.

(b) But see now Sale of Goods Act, 1893, s. 9.

(c) *Farina v. Home*, 16 L. J. Ex. 73; 16 M. & W. 119.

“was not in effect the same thing as the delivery and receipt of the goods. . . . This warrant is no more than an engagement by the wharfinger to deliver to the consignee, or any one he may appoint.”

The case of *M'Ewan v. Smith* (a) was heard on appeal in the House of Lords in 1849 from the Court of Session. Smith and Co., the sellers, instructed Alexander to place certain sugars in Little's warehouse. Little entered them as “Received from James Alexander for J. and A. Smith.” Smith and Co. then sold the sugar to Bowie and Co., and gave them a delivery order on Alexander. Bowie and Co. took no steps to get possession of the sugar, but sold it to M'Ewan and Co. and handed them the delivery order on Alexander. On the 19th of September, Alexander had written to Smith and Co., giving them a statement of the weight of the sugar, of his warehouse and delivery charges. The statement of the weights was headed, “Weights of forty-two hhds. of sugar, &c., delivered Messrs. James Bowie and Co.” On the 25th of September, M'Ewan and Co. sent to Alexander's office, and there produced the original delivery order on Alexander which Bowie and Co. had given them. A clerk of Alexander's then made this entry in a book in which the weights were entered when weighing over, “Delivered to Messrs. M'Ewan and Sons,” and gave them a note in the following form: “Deliver to Messrs. William M'Ewan and Sons 42 hhds. sugar.” At the date of the trial the latter word “deliver” had been altered into “delivered.” On the 26th of September Smith and Co. heard of Bowie and Co.'s insolvency, and instructed Alexander to take steps to stop delivery, and on the 27th Alexander removed the sugar to another warehouse. The Court of Session gave judgment for the sellers, and was affirmed in the House of Lords. It was argued for M'Ewan and Co. that the delivery to them of the delivery order had the same effect in destroying the seller's right to resume possession that the delivery of a bill of lading would have had, but the House of Lords dissented

(a) *M'Ewan v. Smith*, 2 H. L. R. 309; 13 Jur. 265.

from that view. Nor did the House of Lords consider that the sugar had been constructively delivered by means of the memorandum. Lord Cottenham, L. C., said: "The memorandum did not constitute a delivery, for they (the sugars) were not in the hands of Alexander, by whom the document was given, but in those of the warehousemen, Messrs. Little, to whom the order was directed. It was not the acknowledgment of a fact done by the person who made the acknowledgment, but was an order to a third person, who might or might not think fit to execute it."

In *Gunn v. Bolckow, Vaughan and Co. (a)*, in 1875, the defendants contracted to manufacture rails for the Aberdare Iron Co., the contract stating, "payment to be made by buyer's acceptance of seller's drafts at six months date, against inspector's certificate of approval and wharfinger's certificate of each 500 tons being stacked ready for shipment." The rails were made, and the inspector and wharfinger gave their certificates, the wharfinger's being in the terms following: "I hereby certify that there are lying at the works of Bolckow, Vaughan and Co. 500 tons of iron rails which are ready for shipment." The certificates were from time to time, as the iron was ready, delivered to the Aberdare Co. in exchange for their acceptances. The Aberdare Co. pledged them with Toms, and subsequently became insolvent; Toms died, and his administrator claimed a lien on the rails for the sum advanced. The Court of Appeal, consisting of James and Mellish, L. JJ., held that the defendants' rights as unpaid sellers were not affected by the dealings with the certificates. It is obvious in this case, that the documents were merely statements that the iron was ready for delivery; and were not made by the sellers. They were not documents in which the sellers promised that the iron should be delivered by them to the holders, as in the next case, viz., *Farmiloe v. Bain (b)*. Nor were they documents given by the sellers authorizing the holders to obtain

(a) *Gunn v. Bolckow, Vaughan and Co.*, 44 L. J. Ch. 732; 10 Ch. App. 491.

(b) *Farmiloe v. Bain*, 45 L. J. C. P. 264; 1 C. P. D. 445.

delivery of the goods from some warehouseman, as in *Jenkyns v. Usborne* (a), so that it could not even have been argued that it was a case of the seller having undertaken not to exercise his right to stop the goods. The only way in which the plaintiff could make a case was by attempting to show that there was a custom in the trade to treat these certificates as if they were such documents. But Mellish, L. J., pointed out very clearly that even if that were so, although it might be very good evidence of an equitable charge between the pledgor and pledgee, it could not possibly affect the seller's rights. He said: "The vendor having agreed by his contract that he would give the wharfinger's certificate in order that the purchaser may have evidence that the goods have been actually made, and now are actually ready to be shipped, cannot help giving the certificate; and how the fact of his giving that certificate, which does not profess to be negotiable, and does not profess to require the delivery of the goods to order or to bearer, or anything of the kind, can affect his lien as vendor, merely because the purchaser chooses to borrow money on the faith of it, I am at a loss to conceive."

In the case of *Farmiloe v. Bain* (b), in 1876, the defendants sold to Burrs and Co., 100 tons of zinc, giving them four documents each in the following words: "We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc, off your contract of this date." Burrs and Co. then sold fifty tons of the zinc to the plaintiffs, and indorsed to them two of those documents. The plaintiffs gave their acceptances for the price. Burrs and Co. then became insolvent, not having paid for the zinc, and the Court, consisting of Brett, Archibald, and Lindley, JJ., held that these documents did not amount to a representation that the goods were the goods of Burrs and Co., freed from the unpaid seller's lien, and that the unpaid sellers might set up their lien. Brett, L. J., said, "It is admitted that the

(a) *Jenkyns v. Usborne*, 13 L. J. C. P. 196; 7 M. & G. 678.

(b) *Farmiloe v. Bain*, 45 L. J. C. P. 264; 1 C. P. D. 445.

“document in question is not a known document amongst merchants; therefore the Court must look at it as they would at any other ordinary written instrument. So looking at it, it obviously contains no representation of any fact, and the plaintiffs had no right to rely upon it as such a representation; and consequently they do not bring themselves within either of the propositions as to estoppel, which I ventured to lay down in *Carr v. L. & N. W. Ry. Co. (a)*, and to which I still adhere. It was a mere undertaking or contract between the plaintiffs and their immediate vendees.”

It is interesting to note that whereas these documents were construed by the Judges as being “tokens of authority to receive possession,” the legislature through the medium of the Factors Acts went a step further and assumed that they were documents “used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented” (b).

In the *Imperial Bank v. The London and St. Katherine Docks Co. (c)*, in 1877, Messrs. Carter sold 18 casks of gum sandrac, lying at the defendants’ docks, to Dalton, a broker, who purchased for undisclosed principals. Messrs. Carter signed a delivery order addressed to the defendants, requiring delivery to Dalton’s order. Dalton’s undisclosed principals were Brousson and Co., and Dalton indorsed the delivery order to them, and they pledged it with the plaintiffs, who deposited it with the defendants. But the defendants gave no delivery warrant, and had done nothing amounting to an attornment to the plaintiffs. When Dalton discovered that Brousson and Co. were insolvent, he sent a cheque for the price of the gum to Messrs. Carter, and at about the same

(a) *Carr v. London and North Western Ry. Co.*, 44 L. J. C. P. 113; 10 C. P. 316.

(b) Factors Act, 1889, s. 1 (4).

(c) *Imperial Bank v. London and St. Katherine Docks Co.*, 46 L. J. Ch. 335; 5 Ch. D. 195.

time sent a clerk to the defendants' offices and obtained from the defendants a warrant for the goods in the name of Messrs. Carter. Dalton then sent the warrant to Messrs. Carter, who indorsed it to him (and gave him a second delivery order). Jessel, M. R., held that the effect of the indorsement to the plaintiffs was to authorize them to obtain delivery of the goods, and, if they had done so, or if they had obtained a constructive delivery by getting the dock company to hold as their bailees, there would have been an end of the matter; but they had not done so; their title had not been recognized by entry in the defendants' books, and therefore the unpaid seller's lien had not been discharged.

In the *Merchant Banking Co. v. The Phoenix Bessemer Steel Co. (c)*, in 1877, the defendants contracted to make and sell to Smith and Co. 5,000 tons of steel rails free on board at Liverpool. From time to time, as portions of the rails were ready to be forwarded, the defendants gave Smith and Co. warrants in the following form: "The under-mentioned iron will not be delivered to any party but the holder of this warrant. Phoenix Bessemer Steel Company, Limited. No. 88. Dec. 19, 1874. Stacked at the works of the Phoenix Bessemer Steel Company, The Ickles, Sheffield. Warrant for 403 tons steel rails. Iron deliverable (f. o. b.) to Messrs. Gilead A. Smith and Co. of London, or to their assigns by indorsement hereon." Then followed the particulars of the rails, and the words, "to be delivered free on board at Liverpool." Together with each warrant, the defendants sent an invoice in the following form: "Messrs. Gilead A. Smith and Co., London. Bought of the Phoenix Bessemer Steel Company, Limited, stacked on these works to your order, to be delivered f. o. b. at Liverpool according to your instructions." Then followed the particulars of the rails. Smith and Co. pledged the warrants with the plaintiffs, and became insolvent. The defendants claimed a lien as against the plaintiffs, as unpaid sellers.

(c) *Merchant Banking Co. v. Phoenix Bessemer Steel Co.*, 46 L. J. Ch. 418; 5 Ch. D. 205.

Evidence was given at the trial that by warrants such as these, which stated the iron to be deliverable to the buyers or their assigns by indorsement, it was understood that the unpaid seller had given up his lien. Jessel, M. R., held that the custom had been proved, that a person giving such a warrant must be taken to know the custom, and virtually tells the trade, when he issues the warrant, that the goods are free from the seller's lien. His Lordship also stated that in the particular circumstances of this case, the defendants must have known that the warrants were intended to be used for the special purpose of pledging, and could not, therefore, be heard to set up their lien against the plaintiffs (a).

In all these cases there is no question about the property, whether it be such as a buyer or a pledgee has, having passed to the plaintiff. That is admitted. The question is, can the unpaid seller, notwithstanding that the property has passed, stop the goods *in transitu*, or, what is much the same thing, refuse to make delivery?

It does not seem to be capable of argument, that the indorsement or delivery of a delivery order or warrant would operate, as a matter of law, in the same way that the delivery or indorsement of a bill of lading would do, to determine the unpaid seller's right to stop the goods or withhold delivery.

Nor can it be said that the seller's rights to withhold delivery from the holder are destroyed by reason of the indorsement operating as an assignment to him of the buyer's contract with the seller, for such an assignment would, unless there was an express agreement to the contrary, be subject to equities between the seller and buyer, and one of these equities would be the right to stop the goods.

If, then, the seller's rights to withhold delivery from the holder are gone, the question seems to resolve itself into this: Has the seller represented to the person holding the warrant or delivery order that, as against him, he has waived his lien?

(a) See also *Dixon v. Borill* in 1856, 3 McQueen, 1; *Stonard v. Dunkin* (1809), 2 Camp. 344; *Coventry v. Great Eastern Ry. Co.* (1883), 52 L. J. Q. B. 694; 11 Q. B. D. 776; *Seton v. Lafone* (1887), 56 L. J. Q. B. 415; 19 Q. B. D. 68; *Re Ottos Kopje Diamond Mines*, 62 L. J. Ch. 166; (1893) 1 Ch. 618.

Has he estopped himself from exercising his right to stop the goods?

And in considering these cases, the distinction must be borne in mind between the case where the seller makes a promise to the buyer to deliver the goods to him, or to some one named by him, and the case where the seller makes a promise to the buyer, and also makes a promise to every one into whose hands the order or warrant may come, to deliver the goods to the holder. In the first case, the promise made is made to the buyer, and not to the holder; in the second, it is made to the buyer, and also to the holder.

If this be the correct view, it seems to be a question of fact in each case whether the representation, supposing the document to contain one, was made to the holder or not.

In the last case, *The Merchant Banking Co. v. The Phoenix Bessemer Steel Co.* (a), it seems to have been proved that the representation had been so made.

And in *Farmiloe v. Bain* (b) there appears to have been no such representation, for, as Brett, L. J., said, "It is admitted that the document in question is not a known document amongst merchants" (c).

The main object of the Factors Acts was to secure a *bona fide* buyer or pledgee who had made advances to a factor known to be such, either on the security of the goods themselves or of the documents of title to the goods, against the real owner. The remarks of Willes, J., in the course of his judgment in *Fuentes v. Montis* (d), show very distinctly what were the objects sought to be attained. He said the question is, "How far a person who is not the real owner of goods, but who appears to the world, or rather to those who deal with him, as owner, and who deal with him on the faith of his apparent ownership, should be allowed to confer upon

(a) *Merchant Banking Co. v. Phoenix Bessemer Steel Co.*, 46 L. J. Ch. 419; 5 Ch. D. 205.

(b) *Farmiloe v. Bain*, 45 L. J. C. P. 264; 1 C. P. D. 445.

(c) A memorandum of the terms on which a wharfinger's warrant was pledged does not require to be registered as a bill of sale, *In re Cunningham*, 28 Ch. D. 682.

(d) *Fuentes v. Montis*, 38 L. J. C. P. 95; L. R. 4 C. P. 93.

"a third person a greater title than he himself has. . . .
"Every one is agreed that, with respect to the ordinary
"currency, and bills of exchange whilst running, a person
"who receives them *bona fide* and for value is entitled to hold
"them, notwithstanding any infirmity of title in the person
"from whom he obtains them (a). That, however, is far
"from being so as to ordinary merchandise"; and after
referring to the exceptional cases of sales in market overt and
the sale of goods under circumstances in which the owner
might have rescinded the contract on the ground of the
buyer's fraud, and to the case where the owner had clothed
an agent with an apparent authority to deal with the goods,
he continued: "These instances, however, are exceptional to
"the rule, that no man can give a better title to goods than
"he has himself, and that the real owner is not bound except
"to the extent of an interest which he has parted with or an
"authority which he has given. Now, the result of that
"state of the law with respect to agents employed to sell,
"led to the course of legislation which is known by the
"general description of the Factors Acts; because it was
"held by the Courts of law that the case of a *pledge* of goods
"by a factor intrusted with the possession of goods, and
"authorized to sell them, fell within the general rule, to
"which the instances above enumerated are exceptions, and
"that it did not fall within the exceptions by reason of a
"pledge being an ordinary and accustomed transaction to be
"entered into by a person intrusted as agent to sell, or per-
"haps more properly by reason of the Courts of law having
"treated a pledge as being out of the scope of an authority
"to sell. The legislature seem to have considered that to
"be too narrow a view of the proper scope of the authority
"of an agent to sell; and they were no doubt induced to
"think so by reason of the altered mode of conducting mer-
"cantile transactions in modern times, and because it had
"become a usual and accustomed course for factors intrusted
"with goods for sale, to make advances to their principals,

(a) See *ante*, p. 179.

“either in money or by the acceptance of bills against their consignments, and to keep themselves in funds by repledging the documents of title with bankers or other money dealers.”

Lord Blackburn, in the case of *Cole v. The North Western Bank (a)*, said: “The general rule of law is, that where a person is deceived by another into believing he may safely deal with property, he bears the loss, unless he can show that he was misled by the act of the true owner. The legislature seems to us to have wished to make it the law, that where a third person has intrusted goods, or the documents of title to goods, to an agent, who in the course of such agency sells or pledges the goods, he should be deemed by that act to have misled any one who *bona fide* deals with the agent and makes a purchase from or an advance to him, without notice that he was not authorized to sell or to procure the advance.”

The factor's power chiefly depended upon the second section of 6 Geo. 4, c. 94, by which it was in substance enacted, that any person intrusted with, and in possession of any document of title to goods, should be taken to the true owner of the goods, so far as to give validity to any contract made by him for the sale or pledge of the goods to a person who had not notice that he was not the actual and *bona fide* owner (b).

The meaning of the word “intrusted” in this section, which word occurs in all the Factors Acts up to the Act of 1877, but does not appear in the Act of 1889, was much con-

(a) *Cole v. North Western Bank*, 44 L. J. C. P. 242; L. R. 10 C. P. 372.

(b) The words of the second section of 6 Geo. 4, c. 94, are, “Any person . . . intrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant or order for delivery of goods, shall be deemed and taken to be the true owner . . . of the goods, . . . described and mentioned in the said . . . documents, . . . so far as to give validity to any contract or agreement . . . made or entered into by such person . . . with any person . . . for the sale or disposition of the said goods, or for the deposit or pledge thereof . . . as a security for any money or negotiable instrument . . . advanced or given by such person . . . upon the faith of such several documents . . . : provided, such person . . . shall not have notice by such documents . . . , or otherwise that such person . . . so intrusted as aforesaid is . . . not the actual and *bona fide* owner . . . of such goods . . . so sold or deposited or pledged as aforesaid.”

sidered in two important causes, *Phillips v. Huth (a)*, and *Hatfield v. Phillips (b)*, arising out of the following transaction. Phillips was the owner of two cargoes of tobacco, and he placed the bills of lading in the hands of Warwick, as his factor, for sale. The bills of lading were indorsed to Warwick. The goods arrived, and were deposited in the dock warehouses in the name of Warwick, the indorsee of the bill of lading. Warwick, in consequence of being the indorsee of the bill of lading, and the person in whose name the goods were deposited, was enabled to have dock warrants made out in his own name. He did so, not for the purpose of selling the goods for the owner, but with the fraudulent purpose of raising money for himself. He pledged some of the dock warrants with Huth, and others with Hatfield, for large sums of money. Hatfield and Huth, respectively, *bona fide* believed that Warwick was the owner of the goods. The two actions were to try whether the pledges were valid or not as against Phillips.

Phillips v. Huth (a) was first tried in 1839, before Gurney, B., and the jury found a verdict for the defendant. The Court of Exchequer granted a new trial, on the ground that the pledge was not binding on the owner of the goods at common law, and that Warwick was not intrusted with the dock warrants within the meaning of the Act. Parke, B., in delivering the judgment of the Court, said: "The principal question is, as to the meaning of the second section of the "6 Geo. 4, c. 94, commonly called the Factors Act. Before "the passing of this Act, or rather of the previous Factors "Act, the 4 Geo. 4, c. 83, it was clearly settled, that a factor "or agent for sale, had no power to pledge, whether he was "in possession of the goods themselves, or of the symbol of "the goods, and even though the symbol might bear on the "face of it some evidence of the property being in himself, "as in the case of a bill of lading, in which he was the

(a) *Phillips v. Huth*, 6 M. & W. 572, in 1840.

(b) *Hatfield v. Phillips*, 9 M. & W. 647, in 1842, 14 M. & W. 665; 12 Cl. & F. 343.

“consignee or indorsee. This was in accordance with the general rule, that he who deals with one acting *ex mandato*, can obtain from him no better title than his mandate enables him to bestow.

“But this rule was thought by some to be attended with hardship on merchants and others dealing with factors, on the faith of their being principals, and the legislature, by the 4 Geo. 4, first relaxed this rule, and by the 6 Geo. 4, extended that relaxation. . . . It is very clear that the second section of the 6 Geo. 4, relaxes the rule of the common law, only with respect to those who deal with persons who are not merely in possession of, but are also *intrusted* with the symbol of property. However great the hardship may be on innocent persons, and whatever they may have supposed from finding another in possession of a document bearing the *indicia* of property in himself, still the statute does not apply, and they can acquire no title by virtue of it, unless the document has been intrusted to that person.”

Phillips v. Huth (a) was compromised, but *Hatfield v. Phillips* (b) was tried before Lord Abinger, who directed the jury to consider whether an *intrusting* of the document (the dock warrants made out in Warwick's name) was proved. He expressed a very strong opinion, that there could not, in fact, be an *intrusting* of a document, the very creation of which was a breach of trust, but declined to define *intrusting* as a matter of law, further than that it implied privity and consent. Under this direction, the jury found for the plaintiff. The cause was taken by writ of error into the Exchequer Chamber (c), and the Judges there expressed their concurrence in the doctrine of the Exchequer in *Phillips v. Huth* (a), and affirmed the judgment. The case was taken into the House of Lords, and the judgment of the Exchequer Chamber was affirmed (c).

(a) *Phillips v. Huth*, 6 M. & W. 572.

(b) *Hatfield v. Phillips*, 9 M. & W. 647.

(c) *Hatfield v. Phillips*, 14 M. & W. 665; 12 Cl. & F. 343.

In the meantime, in the year 1842, the legislature passed the statute 5 & 6 Vict. c. 39 (a), which was prospective only, but by the fourth section made such pledges as that in *Hatfield v. Phillips* (b) valid, and that section was reproduced, with an alteration in the language, in section 2 (3) of the Factors Act, 1389.

Another object of the Act of 1842 effected by the first section was to give to persons dealing as *pledgees*, and having notice of the agency, with agents intrusted with the goods or the documents of title to goods, the same security that persons dealing as *buyers*, and having notice of the agency, with agents intrusted with the goods, already had by virtue of the fourth section of 6 Geo. 4, c. 94 (c).

By the first section of 5 & 6 Vict. c. 39, it was enacted that "Any agent who shall thereafter (1842) be intrusted
" with the possession of goods, or of the documents of title
" to goods, shall be deemed and taken to be owner of such
" goods and documents, so far as to give validity to any con-
" tract or agreement by way of pledge, lien, or security *bonâ fide*
" made by any person with such agent so intrusted, and such
" contract or agreement shall be binding upon and good
" against the owner of such goods, notwithstanding the person
" claiming such pledge may have had notice that the person
" with whom such contract or agreement is made is only an
" agent."

(a) 5 & 6 Vict. c. 39, s. 4, *post*, p. 465.

(b) *Hatfield v. Phillips*, 14 M. & W. 665; 12 Cl. & F. 343.

(c) The fourth section of 6 Geo. 4, c. 94, enacted "That . . . it shall be
" lawful to and for any person . . . to contract with any agent . . . in-
" trusted with any goods . . . , or to whom the same may be consigned, for
" the purchase of any such goods . . . , and to receive the same of and pay for
" the same to such agent . . . , and such contract and payment shall be bind-
" ing upon and good against the owners of such goods . . . , notwithstanding
" such person . . . shall have notice that the person . . . making such
" contract . . . is an agent . . . : provided, such contract and payment be
" made in the usual and ordinary course of business, and that such person . . .
" shall not, when such contract is entered into or payment made, have notice that
" such agent . . . is not authorized to sell the said goods, or to receive the said
" purchase-money." By section 1 of 6 Geo. 4, c. 94, it was enacted in substance that
where goods were intrusted to any person who ships them in his own name, and
gets an advance from the consignee, he shall be taken to be the true owner so as

The enactments, however, of 5 & 6 Vict. c. 39 were all in express words confined to "agents intrusted with possession," a word which excludes a buyer, and, consequently, prevented the last statute from having any effect on the seller's rights (*a*). But this defect was remedied by the fourth section of the Factors Act of 1877 (*b*).

The second section of 6 Geo. 4, c. 94, used the words "person intrusted," and though there seems good reason for contending that the object of that statute, and the evil which it was meant to remedy, confined the enactment to persons intrusted, somewhat in the nature of agents for sale, so as to give the Act the same meaning as if the word "agent" had been used as in 5 & 6 Vict. c. 39, instead of "person," yet that was not clear. *Phillips v. Huth* (*c*), however, showed that the words of that section were not to be taken in a very liberal sense, and if the legislature did mean to enact that a buyer, who had not taken possession of goods, might defeat the seller's rights by the indorsement of a document of title, they did not use language very well adapted to express their intention.

It will be noticed that the case was unprovided for in the earlier Acts, where the seller, having sold the goods, retained possession of the documents of title, and then sold or pledged them to a *bonâ fide* buyer or pledgee. And that sales or pledges by a buyer were not provided for, as sales by an "agent intrusted" were. Both of these defects were remedied by the Factors Act of 1877, 40 & 41 Vict. c. 39, by the 3rd section of which it was enacted in substance that where goods had been sold and the seller continued in possession of the documents of title thereto, any sale or pledge of the goods or documents made by the seller or by any person or agent intrusted by the seller with the goods or

to give the consignee a lien, provided the consignee had not notice of the agency; see *Mildred v. Muspons*, 8 Ap. Cas. 884.

(*a*) A merchant's clerk is not an agent within the meaning of the Factors Acts *Lamb v. Attenborough*, in 1862, 31 L. J. Q. B. 41; 1 B. & S. 831, *post*, p. 468.

(*b*) 40 & 41 Vict. c. 39, s. 4.

(*c*) *Phillips v. Huth*, 6 M. & W. 572.

documents should be as valid as if the seller or person were an agent intrusted by the buyer with the goods or documents. Section 3 of this Act was re-enacted by section 8 of the Factors Act, 1889, in more precise language: "Where a person having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same." This section altered the law as laid down in *Johnson v. Credit Lyonnais* (*post*, page 471). It is reproduced by section 25 (1) of the Sale of Goods Act. Section 4 of the Act of 1877 enacted in effect, that where goods had been sold and the buyer obtained the possession of the documents of title thereto from the seller, any sale or pledge of such goods or documents by the buyer or by any other person or agent intrusted by the buyer with the documents should be as valid as if the buyer or other person were an agent intrusted by the seller with the documents within the meaning of the Factors Acts. This section is re-enacted by section 9 of the Factors Act, 1889, and reproduced in section 25 (2) of the Sale of Goods Act, but deals specifically with the case of goods left in the possession of the seller, a matter which the former Act left in some obscurity (*a*).

The construction of 5 & 6 Vict. c. 39 and of the previous Acts came under the consideration of the Courts in the following cases.

Baines v. Swainson (*b*), in 1863, turned upon the fourth section of 6 Geo. 4, c. 94; the plaintiffs, who were cloth

(*a*) See *Shenstone v. Hilton*, 63 L. J. Q. B. 584; [1894] 2 Q. B. 452; *Helby v. Matthews*, 64 L. J. Q. B. 465; [1895] A. C. 471.

(*b*) *Baines v. Swainson*, 32 L. J. Q. B. 281; 4 B. & S. 270, *post*, p. 470.

manufacturers, were applied to by Emsley, a factor and commission agent, who said he could find them buyers, and mentioned Sykes and Son, a firm known to be of good standing. The plaintiffs sent the cloth to Emsley's warehouse for the purpose of having it sent on to Sykes, but Emsley fraudulently sold the goods to the defendants, who bought *bona fide*. It was argued for the plaintiffs that Emsley was not an agent within the meaning of 6 Geo. 4, c. 94, s. 4, but was merely an agent to receive the goods and pass them on to Sykes. And Martin, B., at the trial was of this opinion. On the motion the Court ordered a new trial, holding that Emsley was such an agent and was intrusted. Blackburn, J., speaking of what amounts to an intrusting, said: "I do not agree with the counsel for the defendants, "that the mere fact of an agent being found in possession of "the goods, although they have been handed to him by the "owner, knowing that he carries on such a business (*i.e.*, one "which in the ordinary course leads to sales and payments), "amounts to an 'intrusting' him as agent; though I think "that under that part of section 4 of stat. 5 & 6 Vict. c. 39, "to which I have referred (a), the fact of a person being put "in possession of goods calls upon the person who gave him "possession to explain and show that it was not an intrusting. "There are many cases to which my brother Crompton has "alluded, in which goods might come into the possession of "a known agent from having been lent or pledged to him, or "hired by him; but that in my opinion, independently of "authority, would not be an intrusting. . . . Therefore, "the question to be determined is, whether these goods

(a) The part referred to is: "And an agent in possession as aforesaid of such "goods or documents shall be taken, for the purposes of this Act, to have been "intrusted therewith by the owner thereof, *unless the contrary can be shown in "evidence.*" This section was amended by the second section of 40 & 41 Vict. c. 39, which provided that, "Where any agent or person has been intrusted with "and continues in the possession of any goods or documents of title to goods, "within the meaning of the principal Acts as amended by this Act, any revoca- "tion of his intrustment or agency shall not prejudice or affect the title or "rights of any other person who, without notice of such revocation, purchases "such goods or makes advances upon the faith or security of such goods or "documents."

“passed from the owners to Emsley as a branch of that
“agency in which, according to the ordinary course of
“business, he would have to sell goods belonging to others,
“and receive payment for them. If they so came into his
“possession, they came to him in the ordinary way. When
“a man employs an agent, part of whose business it is to sell
“goods and receive payment as such agent, and puts him in
“possession of goods, he places him in the position of a man
“at common law having authority to sell or pledge the
“goods; he may have given private instructions to his agent,
“but unless the third person who dealt with that agent had
“notice of them the owner would, at common law, be bound
“by the act of the agent. I construe the Factors Act as
“saying that an agent whose business is to sell goods and
“receive payment for them shall, by virtue of stat. 6 Geo. 4,
“c. 94, s. 4, be clothed with apparent authority to sell, and
“by virtue of stat. 5 & 6 Vict. c. 39, which greatly extends
“the former Act, shall be clothed with apparent authority to
“pledge the goods, provided he sells or pledges them in the
“ordinary course of business: the owner shall be exactly in
“the position of an owner at common law who has clothed
“him with such authority; and his private instructions shall
“go for nothing unless they are brought to the knowledge of
“the person dealing with him (a).”

In the case of *Fuentes v. Montis* (b), in 1868, the plaintiffs, merchants in Spain, sent some wine to one Ponte, their agent in London. Disputes having arisen, they ceased to employ him, and instructed him to deliver the wine over to Collier, another agent. Ponte refused to do so, and afterwards pledged the dock warrants for the wine, which had been made out in his own name, with the defendants. The question was whether this pledge was a good one against the plaintiffs. They contended that Ponte at the date of the pledge was neither an agent nor intrusted with the documents of title. And of this opinion was the Court of

(a) See also *Vaughan v. Moffat*, 38 L. J. Ch. 144, in 1868.

(b) *Fuentes v. Montis*, 37 L. J. C. P. 137; 38 L. J. C. P. 95; L. R. 3 C. P. 268; L. R. 4 C. P. 93.

Common Pleas, and the judgment was affirmed in the Exchequer Chamber on the ground that a person who is to create a valid pledge of his principal's goods must be an agent who is intrusted at the time of effecting the pledge.

The law as laid down in this case has since been modified by section 2 (2) of the Factors Act, 1889, which reproduced and elaborated section 2 of the Factors Act, 1877: "Where
" a mercantile agent has, with the consent of the owner, been
" in possession of goods or of the documents of title to goods,
" any sale, pledge, or other disposition, which would have
" been valid if the consent had been continued, shall be valid
" notwithstanding the determination of the consent; provided
" that the person taking under the disposition has not at the
" time thereof notice that the consent has been determined."

In *Heyman v. Flewker* (a), in 1863, Willes, J., said: "The
" term 'agent' does not include a mere servant or caretaker,
" or one who has possession of goods for carriage, safe
" custody, or otherwise, as an independent contracting party,
" but only persons whose employment corresponds to that of
" some known kind of commercial agent like that class
" (factors) from which the Act has taken its name."

In *Vickers v. Hertz* (b), in 1871, Vickers ordered 800 tons of iron from the Carron Co., who held them at his disposal. Vickers employed Campbell Bros., of Glasgow, to sell the iron for him, and sent them an order in the following terms:—"To the Carron Co., please deliver to Messrs. "Campbell Bros." Campbell Bros. by means of that order induced Hertz to make them an advance on the security of the iron; Campbell Bros. then absconded. The House of Lords considered that this case came strictly within 5 & 6 Vict. c. 39, s. 1, and that Campbell Bros. were agents intrusted with documents of title.

(a) *Heyman v. Flewker*, 32 L. J. C. P. 132; 13 C. B. N. S. 519; followed by Stirling, J., in *Tremoille v. Christie* (1893), 69 L. T. 338. See also the observations of Willes, J., in *Fuentes v. Montis*, 37 L. J. C. P. 141; L. R. 3 C. P. 278; and *ante*, p. 464, n.

(b) *Vickers v. Hertz*, L. R. 2 Sc. App. 113.

In the case of *Cole v. North Western Bank* (a), in 1875, Slee, of Liverpool, was both a warehouse keeper and a broker of sheeps' wool, but not of goats' wool. The plaintiffs had deposited both sheep and goats' wool in Slee's warehouse, and the course of dealing between the parties was for Slee always to await instructions as to the sale of the sheeps' wool, and to act only on receipt of specific instructions received from time to time. Slee never sold goats' wool. Slee pledged both wools with the defendants for an advance of 7,000*l.* No warrants or other documents of title were handed to the defendants, either at that time or subsequently. Slee then absconded. The Court decided that Slee was not a person "intrusted" within the meaning of the Acts, and had no power to pledge, and that decision was affirmed in the Exchequer Chamber. Most of the cases decided on the Factors Acts were examined, and the objects of the legislature in passing them were reviewed at some length in the judgments so as to make them of great value. Lord Coleridge, C. J., firstly referred to the case of *Monk v. Whittenbury* (b), in 1831, which was a case of sale, and therefore came under section 4 of 6 Geo. 4, c. 94. In that case Cramp, who was a flour factor as well as a wharfinger, had received flour in his character of wharfinger, and, without any authority to part with it, had sold it. Lord Tenterden said: "The material question in this case is, whether Cramp was or was not an agent intrusted with the goods in respect of which the action is brought, within the meaning of 6 Geo. 4, c. 94, s. 4. It is difficult to say precisely what is meant in this section by an 'agent intrusted with goods'; but we are clearly of opinion that a wharfinger is not such a person. If a wharfinger were so considered, it would be impossible to say that a carter, a warehouseman, or a packer was not." Lord Coleridge then continued: "Now, supposing that 5 & 6 Vict. c. 39, had not been passed, and we were dealing with 6 Geo. 4, c. 94, the facts of that case are almost

(a) *Cole v. North Western Bank*, 43 L. J. C. P. 194; 9 C. P. 470; 44 L. J. C. P. 233; 10 C. P. 354.

(b) *Monk v. Whittenbury*, 2 B. & Ad. 484.

“identical with those of the present. . . . Slee filled the
 “double character of woolbroker and warehouseman ; and
 “the wools were deposited with him to hold as warehouse-
 “keeper, not as factor to sell, until he should receive specific
 “instructions to do so. If the language of the present
 “Factors Act had been the same as that of the former Acts,
 “that case would have been exactly in point. But it is said
 “the language of 5 & 6 Vict. c. 39, is altered. No doubt,
 “the words are altered : they are, ‘any agent intrusted with
 “‘the possession of goods, or of documents of title to
 “‘goods’ (a), whereas in 6 Geo. 4, c. 94, s. 1, the words
 “were, ‘any person intrusted for the purpose of consignment
 “‘or of sale with any goods,’ &c. What then, do these
 “words mean ? In the first place, are they to be limited at
 “all ? And, if so, does it signify whether the capacity in
 “which the agent receives the goods is one which clothes
 “him with authority to sell them ?”

Lord Coleridge then continued : “In *Baines v. Swainson* (b), the Court of Queen’s Bench, basing their judgment
 “in some degree upon *Wood v. Rowcliffe* (c), held that the
 “question under 5 & 6 Vict. c. 39, was very much the same
 “as under 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94, viz., what
 “sort of agent the person intrusted was,—whether he was
 “intrusted for the purpose of sale, or a person whose general
 “business it was to receive consignments of goods for sale,
 “and received the goods in that character. We arrive,
 “therefore, at the conclusion that a limitation is to be put
 “upon the words of the Act, which brings 5 & 6 Vict. c. 39,
 “though its words are not exactly the same, substantially to
 “the same point as regards the character of the agent to be
 “intrusted, and the capacity in which the goods are received
 “by him. The result is, that, to bind his principals by a
 “sale or pledge, the agent must have been intrusted with the
 “goods for the purpose of sale, or he must be a person who
 “is ordinarily intrusted to sell such goods, and must have

(a) 5 & 6 Vict. c. 39, s. 1, *ante*, p. 464.

(b) *Baines v. Swainson*, 32 L. J. Q. B. 281 ; 4 B. & S. 282.

(c) *Wood v. Rowcliffe*, 6 Hare, 183.

“made the sale or the pledge in the course of his ordinary business, in pursuance of the authority so conferred upon him (a).”

The judgment was affirmed in the Exchequer Chamber.

In the case of the *City Bank v. Barrow* (b), Lord Blackburn said: “The decision in *Cole v. North Western Bank* (c), comes to this: that an agent who can pledge or sell must be an agent of that class, which, like factors, have a business, which, when carried to its legitimate result, would probably end in selling or in receiving payment for goods. . . . If such a person is ‘intrusted’ and is intrusted in that capacity, then in the absence of bad faith on the part of the pledgee, the pledge is good.”

The case of *Johnson v. Credit Lyonnais Co.* (d), in 1877, resembled *Cole v. North Western Bank* (c). Hoffman was a tobacco broker and importer. His ordinary course of business was, when tobacco arrived from abroad consigned to him, to have it placed in bonded warehouses in his name, and obtain dock warrants for it; he then, by his traveller, sold it to merchants, and agreed with them to clear it out of bond when required, they, from time to time as they required tobacco, sending him the amount of duty and dock dues payable in respect of the portion to be cleared. In this instance he had sold tobacco to the plaintiff; the tobacco remained in bond in Hoffman’s name, which it appeared was a common but not an invariable practice in the tobacco trade; the dock warrants were left in Hoffman’s hands and the buyer, the plaintiff, took no steps to have himself entered in the dock company’s books as owner. After the sale, Hoffman fraudulently pledged the tobacco, and handed the dock warrants to the defendants, who had their names entered in the books

(a) *Kingsford v. Merry*, 11 Ex. 577; 1 H. & N. 503.

(b) *City Bank v. Barrow*, 5 App. Ca. 678, in 1880.

(c) *Cole v. North Western Bank*, 43 L. J. C. P. 194; L. R. 9 C. P. 470; 44 L. J. O. P. 233; L. R. 10 C. P. 354.

(d) *Johnson v. Credit Lyonnais Co.*, 47 L. J. C. P. 241; 2 C. P. D. 224; 3 C. P. D. 32.

of the dock company as owners of the tobacco. Hoffman absconded. The principal question was, whether the case came within the Factors Acts, and there was a subsidiary one, whether the plaintiff, by leaving the goods and documents in Hoffman's possession, had clothed him with an apparent authority to pledge the goods, and by his negligence disentitled himself to sue. On the first point Cockburn, C. J., said: "Hoffman "was not 'intrusted' with these goods, or with the documents of title relating to them, as agent to sell or consign, "or indeed as agent in any sense, but stood only in the "position of a paid vendor remaining in possession of the "thing sold till it suited the convenience of the buyer to "accept delivery." But the law on this subject was altered by the Act of 1877, 40 & 41 Vict. c. 39, s. 3, which in effect said (a) that where goods had been sold, and the vendor continued in possession of the documents of title, any sale or pledge by him should be as valid as if such vendor had been an agent intrusted by the vendee; and, as has already been pointed out, this section has now been substituted by section 8 of the Act of 1889, which is reproduced by section 25 (1) of the Sale of Goods Act.

The case of *Sheppard v. Union Bank of London* (b), in 1862, was decided on the second section of 5 & 6 Vict. c. 39, which gave a pledgee the same interest in goods or documents of title taken in exchange as he had in those which were the subject of the original contract. There John Linnett got the goods in question from the plaintiff by a fraud, and deposited them with the defendants as a substituted security for other goods on which advances had been made by them to Sidney Linnett at John Linnett's request. The transaction was *bonâ fide* as far as the defendants were concerned. It was heard on demurrer on three grounds:—1st. That Linnett got them from the plaintiff by a fraud. 2nd. That they were not delivered by Linnett to the defendant in the ordinary course of business. 3rd. That the goods which were originally

(a) *Ante*, p. 464.

(b) *Sheppard v. Union Bank of London*, 31 L. J. Ex. 154; 7 H. & N. 861.

pledged did not belong to John Linnett, and were not deposited by him. The Court held that John Linnett's fraud did not alter the case, that it was not necessary that the deposit should have been made in the ordinary course of business, or that the first deposited goods should have belonged to him (a).

In *Macnee v. Gorst* (b), in 1867, where a factor, having bills of lading of his principal's goods in his hands, pledged them with a third person, on the understanding that the third person would retire a bill of exchange which he held, and which had been accepted by the factor, V.-C. Wood held that this was a pledge for an antecedent debt, and therefore came within section 3 of 5 & 6 Vict. c. 39 (c), and was not good against the principal.

In *Portalis v. Tetley* (d), in 1867, V.-C. Wood held that a factor who had made a valid pledge for an amount less than the value of the goods, might make a further pledge for the balance of their value.

In *Stevens v. Biller* (e), in 1883, it was argued unsuccessfully that a factor who had received special instructions as to the price and manner of selling, had ceased to be a factor, and had become a mere agent (f).

In *Biggs v. Evans*, in 1893 (f), the plaintiff intrusted an opal matrix table-top to an agent, who was a dealer in gems and jewels, on the terms that it should not be sold to any person nor at any price without the authorization of the owner, and that the cheque received in payment should be handed to the owner intact, he agreeing to pay certain commission. The agent sold the table-top for 200*l.* to the

(a) See *Bonzi v. Stewart*, in 1842, 4 M. & Gr. 295.

(b) *Macnee v. Gorst*, L. R. 4 Eq. 315; *Jevan v. Whitworth*, 36 L. J. Ch. 127; L. R. 2 Eq. 692, in 1866; *Kaltenbach v. Lewis*, in 1883, 51 L. J. Ch. 881; 24 Ch. D. 54, reversed in part by the House of Lords, 55 L. J. Ch. 58; (1885) 10 A. C. 617.

(c) This section stated in effect that the Act should not be construed to protect any lien or pledge in respect of any antecedent debt owing from any agent to any person with or to whom such lien or pledge should be given.

(d) *Portalis v. Tetley*, 37 L. J. C. 139; L. R. 5 Eq. 140.

(e) *Stevens v. Biller*, 25 Ch. D. 31.

(f) *Biggs v. Evans*, [1894] 1 Q. B. 88.

defendant, who paid for it by paying 170*l.* to a judgment creditor of the agent's, and paying 30*l.* in cash to the agent. Held, that as the sale was contrary to the conditions named by the owner, the agent was acting outside his authority in selling, and therefore the defendant acquired no title. Held, also, that as the sale was not in the ordinary course of business the defendant was not protected by the Factors Act. This case, it will be noted, was decided on the repealed Acts, the transaction in question having taken place in 1886.

It has been argued that where a seller has negligently allowed a person to remain in the possession of goods or documents, and this person has fraudulently sold or pledged them, the seller has thereby clothed that person with an apparent authority to deal with the goods, and so disentitled himself to set up his title against a *bona fide* purchaser for value or pledgee. Lord Ellenborough, C. J., in *Pickering v. Busk* (a), in 1812, said: "If a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by his principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not."

And in *Johnson v. Credit Lyonnais Co.* (b), the facts of which are set out on page 471, Cockburn, C. J., said: "That Hoffman having thus, by being left in undisturbed possession of the goods and the indicia of ownership—there having been nothing to raise a doubt as to the latter, or any means open to the defendants to ascertain the fact—been enabled to defraud one of two innocent parties, when

(a) *Pickering v. Busk*, 15 East, 43.

(b) *Johnson v. Credit Lyonnais Co.*, 47 L. J. C. P. 245; 3 C. P. D. 36.

“ the question arises as to which of them the loss should fall
“ upon, in reason and justice the loss ought to fall on him
“ who might have prevented, and as a matter of common
“ prudence ought to have prevented, the possibility of the
“ fraud, is what I cannot bring myself to doubt. . . .
“ Sitting here in a Court of Appeal, I feel myself at liberty
“ to say that the authorities fail to satisfy me that at common
“ law the leaving by a vendee goods bought, or the documents
“ of title in the hands of the vendor, till it suited the con-
“ venience of the former to take possession of them, would,
“ on a fraudulent sale or pledge by the party so possessed,
“ divest the owner of his property, or estop him from assert-
“ ing his right to it. If this had been so, there would have
“ been, as it seems to me, no necessity for giving effect by
“ statute to the unauthorized sale of goods by a factor. The
“ doctrine established in *Pickard v. Sears* (a) and *Freeman v.*
“ *Cooke* (b), and the subsequent cases which have proceeded
“ on the same principle, carry the case no further. In all
“ cases decided on this principle, in order that a party shall
“ be estopped from denying his assent to an act prejudicial
“ to his rights, and which he might have resisted, but has
“ suffered to be done, it is essential that knowledge of the
“ thing done shall be brought home to him. Here it is
“ clear that the plaintiff had no knowledge whatever of the
“ advances obtained by Hoffman on the security of the goods,
“ or even of the existence of the dock warrants which made
“ Hoffman appear to be the owner. It would be to carry
“ this doctrine much too far to apply it where advantage has
“ been taken of a man’s remissness in looking after his own
“ interests to invade or encroach upon his rights, in the
“ absence of knowledge on his part of the thing done, from
“ which his assent to it could reasonably be implied. The
“ defence, founded on the allegation of negligence, remains
“ to be considered, that the plaintiff, in omitting to have the
“ goods transferred to his own name, and to have the dock

(a) *Pickard v. Sears*, 6 A. & E. 469.

(b) *Freeman v. Cooke*, 18 L. J. Ex. 114 ; 2 Ex. 654.

“warrants delivered over to him, was wanting in common
“prudence—in other words, was guilty of negligence. I
“cannot bring myself to doubt, and I am strongly confirmed
“in this view by the passing of the recent statute (a), as the
“legislature must have proceeded on the view that there is
“default in the owner in such a case. . . . But whether
“this negligence of the plaintiff will, under the circum-
“stances, give to the defendants any ground of complaint
“which can be enforced in point of law, is a very different
“question. Negligence to afford a ground of action to one
“who has suffered from it must have reference to some duty
“which the party guilty of the negligence owed to him. The
“law is, in my opinion, correctly stated by Blackburn, J.,
“in *Swan v. North British Australian Co.* (b), where, after
“referring to what was said by Parke, B., in *Freeman v.*
“*Cooke* (c), namely, that negligence, to have the effect of
“estopping the party, must be the neglect of some duty cast
“upon the person guilty of it, he goes on to say: ‘This, I
“‘apprehend, is a true and sound principle. A person who
“‘does not lock up his goods, which are consequently stolen,
“‘may be said to be negligent as regards himself; but,
“‘inasmuch as he neglects no duty which the law casts upon
“‘him, he is not in consequence estopped from denying the
“‘title of those who may have, however innocently, pur-
“‘chased those goods from the thief, except in market overt.’
“The same principle would obviously apply to the case of
“goods fraudulently sold or pledged by a person left in
“possession of them. The rule thus laid down is applicable
“here. The plaintiff may have been negligent, and his
“negligence may have brought on the defendants the loss
“of the money they have advanced. But the plaintiff owed
“no duty to the defendants—at least, no duty which the law
“can recognise—either as individuals or as members of the
“general public. This being so, I am of opinion that the
“negligence of the plaintiff neither estops him from claiming

(a) Probably 40 & 41 Vict. c. 39, s. 3.

(b) *Swan v. North British Australian Co.*, 32 L. J. Ex. 273; 2 H. & O. 175.

(c) *Freeman v. Cooke*, 18 L. J. Ex. 114; 2 Ex. 654.

"the goods in question from the defendants, nor gives the latter a counterclaim for the money which they have advanced to Hoffman on the security of the goods" (a).

The Factors Act, 1889, which, with a slight variation, is reproduced by section 25 of the Sale of Goods Act, provides in section 9 that "where a person having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods, or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

It should be noticed that a person who has "agreed to buy goods" means a person who has actually bound himself by agreement to *buy*, and does not include a person having an option to buy (b).

Section 2 (1) of the Factors Act, 1889, indicates the effect of a delivery or transfer by a mercantile agent in possession by consent of the owner: "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition

(a) See also the remarks of Coleridge, C. J., in *Cole v. North Western Bank*, 43 L. J. C. P. 198; 9 C. P. 488.

(b) *Helby v. Matthews*, 64 L. J. Q. B. 465; [1895] A. C. 471; and see also *Lee v. Butler*, 62 L. J. Q. B. 591; [1893] 2 Q. B. 318; *Shenstone v. Hilton*, 63 L. J. Q. B. 452; [1894] 2 Q. B. 452; and *Hull v. Adams*, (1896) 65 L. J. Q. B. 114.

“notice that the person making the disposition has not authority to make the same.”

Section 10 of the Act deals with the effect of the transfer of documents on the seller's lien or right of stoppage *in transitu*, “Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.”

This section is substantially embodied in section 47 of the Sale of Goods Act (a).

The following are the definitions contained in section 1 of the Factors Act, 1889, apart from the definitions of documents of title already quoted :—

“(1.) The expression ‘mercantile agent’ shall mean a mercantile agent having in the customary course of his business as such agent either authority to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods :

“(2.) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf :

“(3.) The expression ‘goods’ shall include wares and merchandise : ”

“(5.) The expression ‘pledge’ shall include any contract pledging, or giving a lien or security on goods, whether in consideration of an original advance, or of any further or continuing advance, or of any pecuniary liability :

“(6.) The expression ‘person’ shall include any body of persons corporate or unincorporate.”

In *Hastings v. Pearson* (b), in 1893, the plaintiffs, who were

(a) *Ante*, p. 417.

(b) *Hastings v. Pearson*, 62 L. J. Q. B. 75; [1893] 1 Q. B. 62.

a firm of jewellers, employed an agent at a salary and commission on cash collected, to sell goods for them at private houses. From time to time the agent was intrusted with goods to sell; it was his duty to account weekly for such goods to the plaintiffs, and he had no authority to pawn them. He, however, pawned a quantity of these goods with the defendant, who took the goods in the ordinary course of business and in the *bona fide* belief that they were the agent's own property. In an action of detinue by the plaintiffs against the defendant, the Divisional Court overruled the decision of the County Court judge, who had held that the agent was a "mercantile agent" within the meaning of the Factors Act, 1889, and Mathew, J., pointed out that the contention of the defendant would strike out from section 2 the important and material words, "when acting in the ordinary course of "business as a mercantile agent," there being no such business as that of an agent to pledge with pawnbrokers small articles of jewellery for the purpose of raising money for the employer of the agent.

In *De Gorter v. Attenborough (a)*, in 1904, the plaintiff, a dealer in diamonds at Amsterdam, sent some diamonds to a diamond broker in London, for sale. The broker, without the authority of the plaintiff, asked a friend of his to pledge the diamonds for him, and accordingly the friend pledged them with the defendants, who were pawnbrokers. The defendants took the diamonds in good faith and without notice that the diamonds were pledged without the authority of the owner. In an action to recover the diamonds, it was held by Channell, J. that although the broker was a mercantile agent within the meaning of the Factors Act, 1889, it was not the ordinary course of business of a mercantile agent to ask a friend to pledge goods entrusted to him, but to pledge them himself, and that therefore the defendants were not protected by section 2 (1) of the Act.

Again, in *Oppenheimer v. Attenborough (b)*, in 1906, the

(a) *De Gorter v. Attenborough*, 21 T. L. R. 19.

(b) *Oppenheimer v. Attenborough*, [1907] 1 K. B. 510; [1908] 1 K. B. 221.

question was whether a broker who had been intrusted with goods for sale, but had pledged the goods, was acting in the ordinary course of business as a mercantile agent. Evidence was given that in the particular trade in question (the diamond trade) it was no part of a broker's duty to pledge diamonds, his sole duty being to find customers who would purchase them; but Channell, J., did not think the practice in the particular trade made any difference, unless the want of authority to pledge was so notorious that persons dealing with the broker must have known and did know it. He was of opinion that the expression "in the ordinary course of business of a mercantile agent" in section 2 meant "of a mercantile agent" and not "of *the* mercantile agent" (a).

(a) See also *Waddington v. Neale*, 23 T. L. R. 464; *Oppenheimer v. Frazer and Wyatt*, [1907] 1 K. B. 519, in part reversed by C. A. in [1907] 2 K. B. 50.

CHAPTER III.

ON THE EXTENT OF THE UNPAID SELLER'S RIGHTS WHILST IN POSSESSION AND OF THE RIGHT TO RESCIND THE CONTRACT.

AN unpaid seller is defined by section 38 of the Sale of Goods Act, which provides:—

“(1.) The seller of goods is deemed to be an ‘unpaid seller’ within the meaning of this Act—

“(a.) When the whole of the price has not been paid or tendered ;

“(b.) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

“(2.) In this part of the Act the term ‘seller’ includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.”

The unpaid seller's rights are declared by section 39:—

“(1.) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

“(a.) A lien on the goods or right to retain them for the price while he is in possession of them ;

“(b.) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them ;

“(c.) A right of re-sale as limited by this Act.

“(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and

“co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer” (a).

It seems to be established, that in all three positions the right exceeds a mere lien, which would only entitle the seller to retain the goods until he had been paid for them, and would not enable him to confer any title on a third person, either by way of sale or pledge (b), that is to say, the seller's right interferes not only with the buyer's right of possession, but also with his right of property; but that the seller's right does not in any one of the cases amount to a right to resume a complete right of property, so as to divest totally the buyer's right of property; or in other words, that the seller cannot treat the contract of sale as rescinded, so as to resume his property as if the sale had never been made.

The precise extent of the seller's right between those limits is very much a matter of conjecture. It would seem that, viewing it as a practical question, the most convenient doctrine would be to consider the seller as entitled in all cases to hold the goods as a security for the price, with a power of resale to be exercised, in case the delay of payment was unreasonably long, in such a manner as might be fair and reasonable under all the circumstances. If the resale was conducted by the seller in a fair and reasonable manner, the original buyer who was in default would have no right to complain; if the resale produced a sum greater than the unpaid portion of the price, the buyer would be entitled to the surplus; if there was a deficiency, he would still remain indebted to the seller for that amount. If the buyer, previously to the resale, tendered all that was due, he would be entitled to consider the resale as altogether tortious, and to maintain trover against the seller (c); but if he did not make that tender, his remedy for an abuse of the power of sale would be by an action for that abuse, and not by an action of trover.

(a) See also Sale of Goods Act, s. 43.

(b) *Thames Iron Works Co. v. Patent Derrick Co.*, 29 L. J. Ch. 714; 1 John. H. 93; *Scott v. Newington*, 1 Moo. & Rob. 252.

(c) *Walter v. Smith*, 5 B. & Ald. 439.

The unpaid seller's rights cannot be attributed to the effect of the agreement of the parties in the contract of sale.

It is true, that as the buyer's rights in the goods sold are acquired entirely under the contract of sale, he can claim no right greater than he has bargained for, so that his rights are subject to such limitations as may have been imposed by the contract. But the unpaid seller has rights of a peculiar nature, which are conferred by the law, though they are not such as on the ordinary rules of construction would be impliedly reserved by the contract, and though one of them at least (*stoppage in transitu*) is of a nature that could scarcely be created by the agreement of the parties.

The establishment of this position is a step of some importance in ascertaining the principles on which the nature and extent of the rights depend, and it may be as well in the first place to consider at more length what the extent of the seller's rights would be if they were neither more nor less than those intended to be reserved to him by the agreement of the parties to the contract of sale, and to consider later on what are those rights of the seller which are not reserved to him by the contract.

In considering this, we must of course apply to the contract of sale the ordinary legal rules of construction applicable to contracts in which each of the contracting parties undertakes to do something, sometimes called *synallagmatic contracts*.

In construing contracts of this nature, it is always a question of importance to ascertain to what extent the undertaking of the one party is dependent on the due performance of the contract by the other. The parties may intend that the one side shall literally and completely fulfil some part of the contract, before the other side shall be bound to do any thing; and if they do so agree, it is right that they should be bound by their agreement. The consequence may be, that the party who has failed in the literal performance of

his part of the contract may have incurred much expense, and conferred much benefit on the other side by a partial performance, without receiving any recompense; but if such was the intention of the parties when entering into the agreement, it is to be supposed that they took it into consideration in calculating the amount of the recompense thus made contingent. But the parties may not intend this, but that each party shall perform his part of the contract independently, so that a breach of contract by the one party shall not absolve the other from the obligation he has come under on his part.

Now, in a contract of sale, the seller agrees to transfer the property and the possession of the goods to the buyer, who agrees to accept and pay for them, and what at present we propose to ask is, how far on the ordinary principles of construction the parties must be considered to intend to make the passing of the rights of property and possession dependent upon the punctual payment of the price.

In general, the expressed intention of the parties to a contract decides whether the obligation on one party to perform some part of his contract, is dependent on the due performance of some part of the contract of the other side, or whether the parties are bound independently, each having a remedy by action for any breach of contract on the other side, but not being absolved from his own engagement by such a breach. But though the intention of the parties is the thing to be ascertained, yet, where the whole agreement is such as to show that the non-performance of a part of the contract may still leave the other side a benefit from the performance of the rest of the contract, the parties must express their intention very clearly, if they mean the default of the party in the performance of that part to operate as a forfeiture of all recompense for the benefit that may be conferred by the performance of the rest of the contract. The penalty may be so disproportioned to the default, that though the parties may legally enter into such an agreement, it is too unreasonable not to require very clear proof. The whole law on the subject may be found contained in the notes

to *Pordage v. Cole* (a), and *Cutter v. Powell* (b), and to those the reader is referred.

Tindal, C. J., said that the question whether covenants are to be held as dependent on, or independent of, each other, is to be determined by the intention and meaning of the parties as it appears by the instrument and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way.

The rule, that mutual agreements shall not be taken to be dependent, except where the terms of the contract show an intention that they are to be, and except where the non-fulfilment of the one goes to the whole consideration for the other, is material in considering how far the parties to a contract of sale can be considered as intending to reserve to the seller a right to resume the property in the things sold on default of payment.

In an agreement amounting to a sale, a failure in the punctual payment of the price never can literally go to the whole consideration for the sale. The property is transferred from the moment the contract of sale is completed, and with the property the risk. The buyer therefore, during the interval between the completion of the sale and the time when he becomes in default, is liable to the risk of loss of the goods. In some cases, the value of this liability may be very large, in others very small, but in every case it must be of some value. In most cases of stoppage *in transitu*, the goods are stopped at the end of a sea voyage, during which they have been at the risk of the insolvent, and in those cases the risk has evidently been considerable; and *Rugg v. Minett* (c) is a case which shows that even on land the transfer of the property a few minutes earlier or later may be of great pecuniary value. If the parties by the terms of their agreement show an intention to make the punctual payment of the price of the essence of the contract they may do so, but it

(a) *Pordage v. Cole*, 1 Will. Saund. 518.

(b) *Cutter v. Powell*, 2 Sm. L. Ca. 1.

(c) *Rugg v. Minett*, 11 East, 210, *ante*, p. 188.

seems that in such cases the agreement does not amount to a sale (a), and that consequently the property and risk remain with the seller.

It is perfectly obvious that in addition to this liability to the risk of loss which must exist in every case of a sale, the buyer may, in particular cases, have undertaken many things besides the payment of the price, and, consequently, that the buyer, though in default as to payment, may have conferred benefit on the seller under the contract.

It certainly would be a very rude sort of jurisprudence which made a delay in payment of the price amount in all cases to a complete divestment of the buyer's right of property in the goods, so as to destroy his right in future, under any circumstances, to obtain a benefit under the contract of sale. The seller sustains some damage from the default in making payment, and he is entitled to compensation from the buyer for that damage. But if the default operates as a forfeiture of the buyer's right of property, there is no necessary proportion between the damage and the compensation. The seller would benefit by being entitled to resume the property with which he had parted, but there are conceivable cases in which this benefit might be out of all proportion greater than the damage he could have sustained by the buyer's default. And the loss sustained by the buyer, by rendering his partial performance useless to him, might be an outrageously severe penalty for his default.

It seems, therefore, not too much to assert, that a default in making punctual payment cannot be considered as going to the root of a whole contract of sale, or, in other words, does not amount to the whole consideration for the seller's undertaking, and, consequently, that on the ordinary rule of construction, the mutual agreements are not to be taken to be dependent, and therefore the parties cannot be considered as agreeing to give the seller a right to resume any property in the goods sold. Any right which he has to interfere with the property vested in the buyer must be founded on

(a) *Ante*, p. 213.

something else than the intention of the parties to the agreement.

The seller's right to interfere with the buyer's right of possession is somewhat different.

The rules laid down by Williams, Serjt., in his note to *Pordage v. Cole* (a), will be found, on examination, to be founded on strong sense. "1st. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance. . . . But—2. When a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance. . . . 5. Where two acts are to be done at the same time . . . neither party can maintain an action without showing performance of, or an offer to perform his part, though it is not certain which of them is obliged to perform the first act, and this particularly applies to all cases of sale."

By applying these rules to the construction of a contract of sale, it appears at once, that where by the terms of the contract there is nothing said about the time of delivery of possession, or payment of the price, the intention of the parties must be taken to be, that these are to be concurrent acts, and, consequently, that the intention of the parties is not to give the buyer the right of possession until he has paid, or tendered the price (b). And this is still more clearly the case, where it is stipulated that the price shall be paid in advance. In each of those cases, therefore, it must be taken, that the parties intend to give the seller a right to retain possession till the price is paid, or in other words, a right of lien for the price.

(a) *Pordage v. Cole*, 1 Will. Saund. 551.

(b) Sale of Goods Act, section 28.

But when express credit is given in the contract of sale, the case is different. There, by the terms of the agreement, the right of possession is to precede the payment of the price, and, therefore, on the ordinary principles of construction, the intention of the parties must be taken to be, to give the buyer an absolute and independent right to the possession. In such a case, therefore, the parties do not intend to give the seller any right of lien; and the insolvency of the buyer would not, on ordinary rules, make any difference, for in general, the insolvency of a contractor does not release the other party from the contract (*a*).

The seller's rights, therefore, if they depended on the agreement of the parties merely, would be very limited. He would in no case have more than a lien in the strictest sense of the word, a mere right of retainer; and he would not have even a lien, when express credit had been given, though the buyer might be insolvent, or even a bankrupt, and he would have no right whatever to stop the goods *in transitu*. There is no difficulty in saying that the seller's rights are more extensive than these. It follows, therefore, that we must seek for their foundation in something else than the contract of the parties.

We may now proceed to consider what the seller's rights are in addition to such as are intended to be reserved to him by the contract of sale.

There seem to be no traces of these rights in the earlier law books. The only case that has been found bearing on the subject, is that in the 17 Edw. 4, 1, 2, already translated (*b*). In that case, decided in the year 1478, two out of three Judges seem to have thought, that the property in goods concerning which there was a contract of sale, could not be intended to be transferred before payment, because if it did pass, the seller could have no right inconsistent with the buyer's right of property, and would be unfairly placed in the position illustrated by Choke, J., in clear and pointed

(*a*) *Gibson v. Carruthers*, 11 L. J. Ex. 145; 8 M. & W. 321; see *Sale of Goods Act*, s. 41 (1).

(*b*) *Ante*, p. 284.

language. "Do you think it is my (the seller's) intent that you shall have the horse without paying the money? I say no, and I may sell him to another in the mean time, and you shall have no remedy against me, for otherwise, I shall be compelled to keep my horse for ever against my will, and you shall take him when you please, which is contrary to reason." He did not perceive any intermediate state of things between an indefeasible vesting of the right of property in the buyer, with the consequence, which, as he truly says, is contrary to reason, and an absolute remaining of the property in the seller till payment. And Brian, C.J., who held that the property was in the buyer, but that the seller had a right to retain the goods till payment, does not seem to have thought that the seller had more than a mere lien. He likens the case to that of a bailee, and takes no notice of Choke's very forcible remark, that if the seller was bound to keep the goods for ever, it was unreasonable. This case is repeatedly cited in the different digests, but there seems to be no independent authority till the case of *Langfort v. Tiler* (a), in 1705. It seems impossible to suppose that there should have been no litigation on such a subject, and the most probable conjecture is, that amongst the country people, sales were all for ready money, and in mercantile cases, the disputes were decided in the staple, or at least according to the law merchant. If this be so, the seller's rights whilst in possession, like his analogous right of stoppage *in transitu*, owe their origin neither to common law nor to equity, but to the custom of merchants.

The case of *Langfort v. Tiler* (a) is reported in two different reports, both agreeing as to what Lord Holt said, but in other respects exactly contradicting each other. In Salkeld, it is said that the plaintiff had sold the defendant some tea, that she took away part, and paid part of the price of the residue. In the other report it is said, that the plaintiff was the buyer of the tea, not the seller. Neither report

(a) *Langfort v. Tiler*, 1 Salk. 113; 6 Mod. 162.

says what was the decision, but both state in nearly the same words that Holt, C. J., ruled, "that after earnest given, "the vendor cannot sell the goods to another without a "default in the vendee, and therefore, if the vendee does not "come and pay and take the goods, the vendor ought to go "and request him; and then if he does not come and pay "and take away the goods in convenient time, the agreement "is dissolved, and he is at liberty to sell them to any other "person." There is nothing in the context to show in what sense Holt used the word "dissolved." It is not a word having, like "rescinded," a technical and ascertained sense, but perhaps it was used as equivalent to that word. At all events, it is clear that Lord Holt thought the property was by the bargain in the buyer, and yet that the seller was not bound to keep the property for ever.

As has been already said, more recent decisions (a) seem to establish that the unpaid seller's right exceeds a mere lien, and does not amount to a right to resume the absolute property.

The seller's rights in all cases exceed a lien. In cases of insolvency they come into operation, although there has been express credit. Even when the buyer is not insolvent the seller's rights revive, if he is suffered to retain possession till after the credit has expired.

Section 41 of the Sale of Goods Act, 1893, provides:—

"(1.) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

"(a.) Where the goods have been sold without any stipulation as to credit;

"(b.) Where the goods have been sold on credit, but the term of credit has expired;

"(c.) Where the buyer becomes insolvent."

(a) *Ante*, p. 482.

The authorities may most conveniently be taken here.

The two first propositions stated on the previous page were the very points decided in two following celebrated cases: *Bloxam v. Sanders* (a), and *Bloxam v. Morley* (b), in 1825.

In *Bloxam v. Sanders* (a), Saxby had purchased of Sanders and Co. a quantity of hops. There seems to have been no credit given; no part of the price was paid, and the hops were not delivered. Sanders and Co. gave Saxby notice that if he did not pay for the hops they would resell them, holding him liable for the difference in price. Then Saxby, before any resale, became bankrupt, and Sanders and Co. did resell the goods. Saxby's assignees brought trover against them for so doing. In *Bloxam v. Morley* (b), Saxby had purchased hops from Morley on credit, but the credit expired before he became a bankrupt, and before the resale. He had paid Morley a considerable part of the price, 700*l.*, and Morley did not return nor offer to return any part of this sum to Saxby or his assignees before the resale, and Saxby's assignees brought trover against him; in other respects the case was identical with *Bloxam v. Sanders* (a). The Court of King's Bench decided both cases in favour of the defendants. The judgments seem carefully framed, so as to avoid expressing an opinion as to the positive rightfulness of the resale; but they decided, that though the property had by the sale vested in the buyer, and in Morley's case the right of possession too during the credit, yet, said Bayley, J., in *Bloxam v. Sanders* (a), "the right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession. Whether default in payment when the credit expires will destroy his right of possession (if he has not before that time obtained actual possession), and put him in the same position as if there had been no bargain for credit, it is not now necessary to inquire, because this is a case of insolvency, and in case of insolvency the point seems to be perfectly

(a) *Bloxam v. Sanders*, 4 B. & C. 941.

(b) *Bloxam v. Morley*, 4 B. & C. 951.

"clear." In *Bloxam v. Morley* (a) he says, "This was not an action for damages for selling without returning the 700*l.*, or for selling when, according to his contracts with Saxby, he had no right to sell, but it was an action of trover, assuming that the property was in the assignees of Saxby, and that the sale by the defendant vested also the right of possession in them. . . . It seems to us, however, upon the same principles which prevented the plaintiffs from maintaining the action against Sanders, they cannot maintain the present action."

These cases are, therefore, direct authorities for the two propositions, that in cases of insolvency before the actual delivery, the seller's right revives after the credit has expired, and that in cases of insolvency at least it exceeds a lien.

The case of *Dixon v. Yates* (b), in 1833, is also a direct authority that in cases of insolvency the seller's right revives even after a subsale made whilst the credit existed, and the buyer was solvent. In that case there was no occasion to inquire what the extent of the seller's right was, nor whether it exceeded a lien or not.

In *Wilmshurst v. Bowker* (c), in 1839, the point arose before the Common Pleas on the record. The bargain was, that possession was to be delivered on receipt of a banker's draft. The buyers, who were *not* insolvent, did not punctually deliver the banker's draft, and the seller instantly resold the goods. The buyers brought trover, and by a new assignment confined their complaint to the resale. The Court of Common Pleas decided on demurrer, that whether this resale was justifiable or not, the plaintiffs were not entitled to the possession of the goods, as they had not given the banker's draft (d), and therefore, said Tindal, C. J., "the plaintiffs, according to the decision of the King's Bench in *Bloxam v.*

(a) *Bloxam v. Morley*, 4 B. & C. 952.

(b) *Dixon v. Yates*, 5 B. & Ad. 313, *ante*, p. 370.

(c) *Wilmshurst v. Bowker*, 5 Bing. N. C. 541.

(d) But on appeal to the Exchequer Chamber, reported in 7 M. & G. 882, the Court held that the delivery of the banker's draft was not a condition precedent, *see ante*, p. 161.

“*Sanders* (a), with the facts of which case those of the present very nearly agree, cannot maintain trover, however they might have been able to have brought a special action upon the case against them for any damage sustained in consequence of the resale, without waiting a reasonable time for the remitting of the banker’s drafts; and this meets the justice of the case, for in such an action they would recover only the damages actually sustained in consequence of the resale, which might be very small, and not as in an action of trover, the full value of the goods for which they have not paid according to the terms of the contract.” This was a decision that the seller’s right exceeds a mere lien whilst the buyer is in default, though solvent.

And the same Court afterwards, in *Milgate v. Kebble* (b), in 1841, decided the same point. The seller resold the goods, and the buyer brought trover against him for so doing. The facts appeared to be, that the buyer had, before the resale, paid a considerable portion of the price, but that he was in default in paying the remainder. The buyer was solvent, and the jury found expressly, that the resale was unreasonable, and gave a verdict for the plaintiff. But the defendant subsequently moved to nonsuit the plaintiff on the ground that his, the seller’s, right of possession had not been lost, and therefore the plaintiff was not entitled to maintain trover against him, and was successful. In this case the buyer, at the time of the resale, was still in default, and had made no tender of the unpaid part of the price before the resale, and therefore the defendant was an unpaid seller, with a lien on the goods.

In *Martindale v. Smith* (c), in the same term, the Queen’s Bench decided, that where the plaintiff, being in default, had made a tender before the resale, trover would lie. The cases are perfectly consistent; *Milgate v. Kebble* (b) decided that the seller’s right exceeded a right of lien, and interfered with

(a) *Bloram v. Sanders*, 4 B. & C. 941.

(b) *Milgate v. Kebble*, 3 M. & G. 100, *post*, p. 499.

(c) *Martindale v. Smith*, 1 Q. B. 369, *post*, p. 505.

the buyer's right of property ; *Martindale v. Smith* (a), that it did not absolutely *supersede* his right of property.

It is not too much to assume, that the seller's rights to retain arise under the same circumstances as his rights to stop *in transitu* would arise, if the goods were put in motion. It would be rather an anomaly if the seller, in order to raise his rights, was obliged to put the goods in motion, and then stop them again; and it seems always taken for granted, that these analogous rights are coextensive, and that the seller may justify a retention of the goods, under the same circumstances as would justify a stoppage of them.

In *Valpy v. Oakeley* (b) the buyers accepted three bills against goods according to contract ; they met the first bill at maturity, and became bankrupt after the time for the delivery of the goods had expired, but before the other two bills had reached maturity. The whole of the goods had not been delivered, and the buyers' assignees brought this action against the seller for not delivering the residue, and recovered nominal damages, Lord Campbell, C. J., saying of the two outstanding bills, " While current they were payment, when dishonoured " they were waste paper . . . and there being no difference " shown between the market price at the time of default and " the contract price, the vendees could have recovered only " nominal damages. No more therefore can the assignees."

It was twice ruled at Nisi Prius, once by Bayley, J., in *New v. Swain* (c), in 1828, and again by Littledale, J., in *Bunney v. Pointz* (d), in 1832, that where the owner of goods sells on credit, and the buyer suffers him to retain possession till the credit has expired, the seller then acquires a right to retain them till the payment is made, although the buyer, who is in default, does not ultimately prove insolvent, and the ruling in these cases was embodied in section 41 (1) (b) of the Sale of Goods Act (*ante*, page 490).

(a) *Martindale v. Smith*, 1 Q. B. 389, *post*, p. 506.

(b) *Valpy v. Oakeley*, 20 L. J. Q. B. 381 ; 16 Q. B. 941 ; *Griffiths v. Perry*, 28 L. J. Q. B. 204 ; 1 E. & E. 680.

(c) *New v. Swain*, 1 Dans. and Loyd, 193.

(d) *Bunney v. Pointz*, 4 B. & A. 568.

Assuming, therefore, what seems pretty well established, that the seller's rights exceed a lien, and are greater than can be attributed to the assent of the buyer, under the contract of sale, the question arises, how much greater than a lien are they? It is clear that in no case do they amount to a complete resumption of the right of property, or in other words, to a right to rescind the contract of sale, but perhaps come nearer to the rights of a pawnee with a power of sale, than to any other common law rights. At all events, it seems that a resale by the seller, whilst the buyer continues in default, is not so wrongful as to authorize the buyer to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it still due; nor yet so tortious as to destroy the seller's right to retain, and so entitle the buyer to sue in trover. It has been repeatedly stated by Judges that the seller cannot rescind the contract except where it may be presumed from the conduct of the other party that he also intended to rescind the contract.

Before entering upon this subject, on which it will be proper to endeavour to collect all the authorities, it may be as well to clear the subject from one or two cases in which the buyer's right of property may be completely devested, but by the operation of perfectly different rules of law.

First of all, it is to be observed, that a seller who has retained the possession of goods, and becomes a bankrupt, may come within the provisions of the bankrupt laws (a), as a reputed owner of the goods, having at the time of his bankruptcy the possession of the goods by consent of the true owner, that is, of the buyer. *Knowles v. Horsfall* (b). In cases of this nature, it is quite immaterial whether the seller had more or less legal interest in the goods; the question is, whether the buyer suffered him to be reputed owner or not. It does not, therefore, belong to the present subject to treat of this class of cases.

(a) See the 44th section of the Bankruptcy Act of 1883.

(b) *Knowles v. Horsfall*, 5 B. & A. 134.

Secondly, a sale transferring the property in goods, and not accompanied by a delivery of possession, may be void as against the seller's creditors, because fraudulent, either at common law, or by the statute 13 Eliz. c. 5. It is not, however, a matter of law that a sale unaccompanied by delivery of possession, is void as against creditors, but only that the want of an open change of possession, as evidence, tends to show that the sale was made with a fraudulent intention.

The law, and cases upon this subject, are collected in a note to *Twyne's* case, in Smith's Leading Cases, to which the reader is referred.

In *Martindale v. Booth* (a), in 1832, the King's Bench decided that a bill of sale by way of mortgage was good as against an execution creditor, although no possession was delivered, and Parke, J., said, that "the want of delivery was "only evidence that the transfer was colourable."

In *Eastwood v. Brown* (b), in 1825, where there was a sale of goods of which the seller remained in possession, Abbott, C. J., held that it was not in itself a void sale as against an execution creditor, but left it to the jury to say on the whole case, whether it was an arrangement for the purpose of delaying, or defeating creditors, and the jury found in favour of the sale, and the summing up was not afterwards questioned.

These cases are authorities that the property is in the buyer, against third persons as well as against the seller. But though the seller has not the property in the goods, he may nevertheless have power to sell them, so as to confer a good title on a subsequent buyer. There is a dictum of Abbott, C. J., in *Knowles v. Horsfall* (c), to the effect that a seller suffered to retain possession of the goods, is clothed by the buyer with an apparent authority to deal with them as his own, and that consequently, a sale by him would bind the first buyer. This may be somewhat doubtful, and is not in agreement

(a) *Martindale v. Booth*, 3 B. & Ad. 498.

(b) *Eastwood v. Brown*, R. & M. 312.

(c) *Knowles v. Horsfall*, 5 B. & A. 140.

with *Reeves v. Capper* (a), but this principle can only apply where the second buyer bought *bonâ fide*, and without notice of the prior sale; when it does apply, it must be immaterial whether the first buyer has paid the full price or not, for the apparent authority given to a paid seller, who is suffered to retain possession of the goods, is quite as extensive as that given to an unpaid seller in similar circumstances. Such a question can hardly arise without a criminal fraud on the part of the seller, and considerable negligence on the part of the buyer.

The buyer's rights may also be devested by the operation of the Factors Acts (b), and by a sale in market overt (c).

(a) *Reeves v. Capper*, 5 Bing. N. C. 136; 2 Jur. 1067; 6 Scott, 877.

(b) *Ante*, p. 458.

(c) The positions of a buyer for value, an execution creditor, and a trustee in bankruptcy, are not the same. A buyer for value, if he had no notice of any equities affecting the property, takes his seller's interest in the property unaffected by those equities. An execution creditor can only seize his debtor's interest (*Lanyon v. Toogood*, in 1844, 13 L. J. Ex. 273; 13 M. & W. 27; *Glaspoole v. Young*, in 1829, 9 B. & C. 696; *Nicolls v. Bastard*, 2 C. Mee. & Ros. 759; *Manders v. Williams*, 18 L. J. Ex. 437; 4 Ex. 339); and, therefore, if there is any equity affecting the property, he can only seize it subject to that equity, whether he had notice of it or not. But the execution creditor may seize property which the debtor has parted with by an assignment, which although good between the debtor and the assignee, was made under such circumstances that the law declines to recognise it as against the creditor. Such a contract may be regarded as void either according to the common law, or under 13 Eliz. c. 5, which enacted that all assignments made for the purpose of delaying, hindering, or defrauding creditors should be void. Whether an assignment was made for that purpose is a question of fact in every case, and such facts as that the transaction was a secret one, or made for a very small consideration, or that the seller remained in possession after the sale, are strong evidence of fraud. But although remaining in possession is strong evidence, it is not conclusive. For example, in the case of a mortgage of chattels, where the nature of the transaction is that the buyer shall only take possession on the happening of some future event. To stop this loophole for fraud, the Bills of Sale Acts have from time to time been passed, making all assignments, whether absolute or by way of mortgage, void, unless registered in the manner prescribed by the Acts. The law on this subject will be found in *Twyne's Case* in Smith's Leading Cases, Vol. I. And so exacting is the law in these cases, that even if the execution creditor had at the time when the debt was contracted notice of the assignment, he is not affected by it, but is in the same position as if he had not had notice (*Edwards v. Edwards*, in 1876, 45 L. J. Ch. 391; 2 Ch. D. 291).

The rights of the trustee in bankruptcy over property which is in fact the property of the bankrupt, are much the same as those of the execution creditor

But to return to the question how far the seller's rights exceed a lien, or in other words, how far a seller partially or totally unpaid, may, after the buyer is in default or insolvent, confer a good title to the goods on a second buyer who has notice of the prior purchase; and, if he can confer such a good title, how far the act conferring it renders him liable to the original buyer whose rights are thus divested, or to what extent that act affects the seller's right to recover or retain the price due from the first buyer.

Section 48 of the Sale of Goods Act provides:—

“(1.) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*.

“(2.) Where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

“(3.) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

“(4.) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.”

In *Langfort v. Tiler* (a), in 1705, Holt, C. J., is reported to have ruled that “after earnest given, the vendor cannot

—he takes it subject to all the equities affecting it, whether he had notice of them or not. But he has rights over property which is not in fact the property of the bankrupt more extensive than those which the execution creditor has, for he may not only take property which the bankrupt has assigned by an assignment which the law will not recognise, but further, by the Bankruptcy Act he may take all goods in the possession of the bankrupt with the consent of the true owner, of which the bankrupt is the reputed owner (Bankruptcy Act of 1884, s. 44).

(a) *Langfort v. Tiler*, 1 Salk. 113, ante, p. 489.

“sell the goods to another without a default in the vendee,
“and therefore, if the vendee does not come and pay and
“take the goods, the vendor ought to go and request him,
“and then, if he does not come and pay, and take away the
“goods in convenient time, the agreement is dissolved, and
“he is at liberty to sell them to any other person.”

This has been sometimes understood to be a ruling, that a resale under such circumstances was rightful, and operated as an election to rescind the contract.

If such were the effect of a resale, it would follow that the seller must return any part of the consideration he had received (*a*). This might not always be possible, and in many cases would be very unjust. The buyer would have taken his chance of the benefit of a rising market, or any other lucky event, and the seller would bear the loss arising from an unlucky one. The circumstances in *Milgate v. Kebble* (*b*), in 1841, illustrate this better than any hypothetical case could do. There the seller sold his crop of fruit for 38*l.*, payable part by instalments, and part on delivery of the fruit. The buyer paid 33*l.*, and if fruit had risen in value, or the crop had proved very good, he would no doubt have paid the remaining 5*l.*, but he did not pay it, and the seller resold the whole of the fruit for 6*l.* The buyer brought trover against him, and the jury found that the resale was unreasonably speedy, and that the buyer's damage in consequence was 5*l.* Surely it would be very harsh law to say, that in consequence of this resale damaging the buyer to the extent of 5*l.*, the seller was to repay him 33*l.*, yet that consequence would follow if the resale rescinded the contract.

In *Hore v. Milner* (*c*), at Nisi Prius, in 1797, Lord Kenyon seems to have considered a resale absolutely tortious, and

(*a*) *Strickland v. Turner*, 22 L. J. Ex. 115; 7 Ex. 208; *Cox v. Prentice*, 3 M. & S. 344; *Eichholz v. Bannister*, 34 L. J. C. P. 105; 17 C. B. N. S. 708; *Stephens v. Wilkinson*, 2 B. & Ad. 320; *Giles v. Edwards*, 7 T. R. 181; *Gompertz v. Bartlett*, 23 L. J. Q. B. 65; 2 E. & B. 849.

(*b*) *Milgate v. Kebble*, 3 M. & G. 100, *ante*, p. 493.

(*c*) *Hore v. Milner*, Peake, 42 n.

estopping the seller from setting up the former contract of sale as still subsisting. In that case, the seller after the resale sued the original buyer for goods bargained and sold, and Lord Kenyon thought that by the resale he had precluded himself from saying the goods were the property of the defendant.

In *Mertens v. Adcock* (a), in 1813, Lord Ellenborough seems to have decided at Nisi Prius that a resale, under a power expressly reserved in the contract of sale, did not prevent the seller from recovering the balance of the price under a count for goods (bargained and) sold, in other words, that the exercise of a power of resale did not rescind the contract of sale. The case is so reported as to be of little value; it was cited in *Lamond v. Davall* (b), in 1847. In that case there was a condition that if the purchase-money was not paid on the day following the sale the goods might be resold and the loss should fall on the buyer. The goods were resold and the seller then brought this action to recover the whole purchase-money from the first buyer and was nonsuited by Erle, J. On the motion Lord Denman, C. J., said that "the power of resale implies a power of annulling the first sale, and that therefore the first sale is on a condition, and not absolute." In delivering the judgment of the Court, Lord Denman did not lay any stress on the fact that the power reserved was an express one, but appears to have decided the case simply on the ground that under the circumstances the sale must be taken to have been a conditional one. And the case appears to be no authority for what the law would be if the contract were not a conditional one. In commenting on this case and contrasting it with *Greaves v. Ashlin* (post, page 501), Mr. Benjamin said, in his work on Sale (c): "When the sale is thus conditional, the vendor's rights are very different from those which exist in the absence of an express reservation of power to resell, and he is in

(a) *Mertens v. Adcock*, 4 Esp. 251.

(b) *Lamond v. Davall*, 16 L. J. Q. B. 136; 9 Q. B. 1030.

(c) Benjamin on Sale, 5th ed., p. 944.

“ *duriori casu*. He runs all the risks of resale without any chance of profit, for he has clearly no right to the surplus if the goods are sold for a higher price at the resale. But where such express reservation does not exist, the effect of a resale not being to rescind the sale, the goods are sold by the unpaid vender *quasi* pledgee, and as though the goods had been pawned to him; they are sold as being the property of the buyer, who is of course entitled to the excess if they sell for a higher price than he agreed to give.”

In *Kymer v. Suwercropp* (a), in 1807, the unpaid seller of goods had retained part of them on the insolvency of the buyer. He afterwards discovered that the buyer was agent for a solvent principal, and sued this principal for goods (bargained and) sold, the defendant's counsel contending, that as to the portion of the goods stopped, the plaintiffs could not recover under the count for goods (bargained and) sold, as the goods were withheld from him, and the contract thereby rescinded. Lord Ellenborough overruled the objection. “The coffee,” said he, “was stopped only to prevent its getting into the hands of the insolvent brokers, and as payment was to precede the delivery, it was enough if the plaintiffs on being paid were ready to have delivered it.”

In *Greaves v. Ashlin* (b), in 1813, at Nisi Prius, before Lord Ellenborough, the facts were, that Ashlin had sold Greaves 50 quarters of oats, at 45s. 6d., out of 175 quarters. It does not appear whether the oats were specified or severed from the 175 quarters, so as to render it a complete sale, but probably they were so. The seller soon after gave the buyer notice that if he did not take them away he should resell them to other persons. He did resell them at 51s. per quarter. The plaintiff Greaves brought an action on the contract for not delivering the goods. Lord Ellenborough said: “If the buyer does not carry away the goods bought, within a reasonable time, the seller may charge him warehouse room, or he may bring an action for not removing

(a) *Kymer v. Suwercropp*, 1 Camp. 109.

(b) *Greaves v. Ashlin*, 3 Camp. 426.

“ them, if he is prejudiced by the delay. But the buyer’s neglect does not entitle the seller to put an end to the contract. When a farmer sets out his tithes, and gives the parson notice to take them away, he may bring his action if the latter does not do so within a reasonable time, but the parson’s neglect does not revest in the farmer the property in the articles set out. In this case the notice given to fetch away the goods, could not discharge the defendant from his contract, nor empower him to sell the property of the plaintiff.”

The plaintiff recovered the difference in price. This is a decision that the default of a solvent buyer does not give the seller a right at his election to rescind the whole contract. The expressions that seemed to show that Lord Ellenborough thought the seller had no more right of resale than the farmer who had set out tithes, are very worthy of attention, but are merely dicta.

These seem to be all the authorities prior to the two cases of *Bloxam v. Sanders* (a), and *Bloxam v. Morley* (b), in 1825, which, as already said (c), decided that the seller’s right, where he had not parted with the possession in case of insolvency, exceeded a mere lien. The reasoning of the Court in their judgment went farther, and seems to lead to the inference, that though the seller had in their opinion more than a lien, yet he had no right to rescind the sale, and that stoppage *in transitu* was not a rescission of the sale. Bayley, J., in *Bloxam v. Sanders* (a), said, “ The seller’s right in respect of the price, is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer’s part, and until he makes such payment or tender, he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession

(a) *Bloxam v. Sanders*, 4 B. & C. 941, *ante*, p. 491.

(b) *Bloxam v. Morley*, 4 B. & C. 951, *ante*, p. 491.

(c) See *ante*, p. 491.

“ and the right of property vest at once in him, but his right
“ of possession is not absolute, it is liable to be defeated if he
“ becomes insolvent before he obtains possession, *Tooke v.*
“ *Hollingworth* (a). Whether default in payment when the
“ credit expires will destroy his right of possession, if he
“ has not before that time obtained actual possession, and
“ put him in the same situation as if there had been no
“ bargain for credit, it is not now necessary to inquire,
“ because this is a case of insolvency, and in case of insol-
“ vency the point seems perfectly clear : *Hanson v. Meyer* (b).
“ If the seller has dispatched the goods to the buyer and
“ insolvency occurs, he has a right in virtue of his original
“ ownership to stop them *in transitu* : *Mason v. Lickbarrow* (c),
“ *Ellis v. Hunt* (d), *Hodgson v. Loy* (e), *Inglis v. Usherwood* (f),
“ *Bohtlingk v. Inglis* (g). Why ? because the property is
“ vested in the buyer, so as to subject him to the risk of any
“ accident, but he has not an indefeasible right to the posses-
“ sion, and his insolvency without payment of the price defeats
“ that right ; and if this be the case after he has dispatched
“ the goods, and whilst they are *in transitu*, *a fortiori* is it
“ when he has never parted with the goods, and when no
“ *transitus* has begun. The buyer, or those who stand in his
“ place, may still obtain the right of possession if they will
“ pay or tender the price, or they may still act upon their right
“ of property if anything unwarrantable is done to that right.
“ If, for instance, the original vendor sell when he ought not,
“ they may bring a special action against him for the injury
“ done by such wrongful sale, and recover damages to the
“ extent of that injury, but they can maintain no action in
“ which right of property and right of possession are both
“ requisite.”

It seems difficult to avoid thinking, that the Judges who

(a) *Tooke v. Hollingworth*, 2 T. R. 215.

(b) *Hanson v. Meyer*, 6 East, 614.

(c) *Mason v. Lickbarrow*, 1 H. Bl. 357.

(d) *Ellis v. Hunt*, 3 T. R. 464.

(e) *Hodgson v. Loy*, 7 T. R. 440.

(f) *Inglis v. Usherwood*, 1 East, 515.

(g) *Bohtlingk v. Inglis*, 3 East, 381.

concurred in that judgment were ready to decide that the seller could not rescind the contract of sale without the consent of the buyer, even if he was in default, and that stoppage *in transitu* did not operate as a rescission of the contract; but it seems they were not quite ready to decide this, for in *Clay v. Harrison* (a), in 1829, some of them exercised much ingenuity to avoid the point, and formed their judgment (as appears from the statement of Parke, B., in *James v. Griffin* (b)) on a ground so subtle, that we may venture to guess the Court were not agreed on the main point, or they would not have acted on such a very refined distinction.

In *Bloxam v. Sanders* (c) the Court seem to have rather carefully avoided saying whether a seller's resale was of necessity wrongful in all cases, whilst they expressly say that the buyer's damage by the resale is not to be estimated by the value of the goods. The question of whether a resale conducted in such a reasonable manner as to work no damage to the buyer, is lawful or not, was of some importance as it affected the manner of pleading and the question of costs, and also as it may affect the title of the second buyer.

In *Macleay v. Dunn* (d), in 1828, the seller, after the buyer had repeatedly refused to take the goods, resold them at a loss, and brought an action on the contract for not accepting the goods. It was contended that the resale operated as a rescission of the contract as against the sellers. The Common Pleas decided that it did not, and in delivering the judgment of the Court, Best, C. J., said that "it is clear the resale did not rescind the contract. It is admitted that perishable articles may be resold. It is difficult to say what may be considered as perishable articles, and what not; but if articles are not perishable, price is, and may alter in a few days or a few hours. In that respect there is no difference between one commodity and another. It

(a) *Clay v. Harrison*, 10 B. & C. 99, *post*, p. 518.

(b) *James v. Griffin*, 2 M. & W. 632.

(c) *Bloxam v. Sanders*, 4 B. & C. 941.

(d) *Macleay v. Dunn*, 4 Bing. 722.

“is a practice, therefore, founded on good sense, to make a resale of a disputed article, and to hold the original contractor responsible for the difference. The practice itself affords some evidence of the law, and we ought not to oppose it except on the authority of decided cases. Those which have been cited do not apply. . . . We are anxious to confirm a rule consistent with convenience and law. It is most convenient, that when a party refuses to take goods he has purchased, they should be resold, and that he should be liable to the loss, if any, upon the resale. The goods may become worse the longer they are kept, and at all events there is the risk of the price becoming lower.”

The decision in this case was, that the resale by the seller did not rescind the whole contract, or prevent him from treating it as subsisting. The dictum of the Court goes to the extent, that the resale was perfectly legal and justifiable; probably it may be so, but there has never been a decision to that extent.

In *Acebal v. Levy* (a), in 1834, the Common Pleas (not consisting of the same Judges as in 1828) said there could be no doubt that a resale by the seller, after a refusal on the part of the buyer to take the goods, did not prevent the seller from suing on the original contract.

In *Martindale v. Smith* (b), in 1841, Smith had, on the 23rd April, sold Martindale six stacks of oats, payment on the 10th July, the stacks to remain, if required, till the middle of August. Smith afterwards, in the beginning of July, told Martindale that if he did not pay on the very day, he should not have the corn. Martindale did not pay on the very day, but two or three days afterwards tendered the price. Smith, who *still had the stacks in his possession*, refused to take the money, and *afterwards* sold the stacks. Martindale brought trover against him, and the Queen's Bench held it would lie, because “the vendor's right to detain the thing

(a) *Acebal v. Levy*, 10 Bing. 376.

(b) *Martindale v. Smith*, 1 Q. B. 389.

“sold against the purchaser, must be considered as a right of lien till the price is paid, and not a right to rescind the bargain, and here the lien was gone by the tender of the price.”

The decision here is, that default on the part of the buyer gives the seller no right to rescind the contract. The Court cannot be understood as saying, that the seller's right was a mere right of lien, and no more : see *Milgate v. Kebble* (a).

In two cases since *Maclean v. Dunn* (b), there were intimations of a concurrence in the dicta in that case. In *Gosling v. Birnie* (c), in 1831, Tindal, C. J., intimated an opinion, that where a seller, partially unpaid, had resold the goods, and the original buyer afterwards paid the balance of the price, the property, nevertheless, was in the second buyer, who had bought *bonâ fide*, but the case was disposed of on another ground.

And in *Fitt v. Cassanett* (d), in 1842, the Court of Common Pleas seem to have been of opinion that a resale, after a refusal to proceed on the part of the buyer, was quite legal, but at all events did not entitle the buyer to treat the contract as rescinded.

The question of the right of one of the parties to rescind a contract where the other party is in default, has arisen on several occasions where there was a contract to deliver goods by instalments, and there has been a failure either in the delivery of an instalment or the payment for it ; and although it is perhaps impossible to reconcile all the cases, yet the difference of judicial opinion becomes very much smaller if the case of *Hoare v. Rennie* (e) be disregarded for this purpose, and the judgments of Field, J., in *Honck v. Muller* (f), in the Court below, and of Brett, L. J., in the Court of Appeal, be considered as the correct ones.

(a) *Milgate v. Kebble*, 3 M. & G. 100, ante, p. 499.

(b) *Maclean v. Dunn*, 4 Bing. 722, ante, p. 504.

(c) *Gosling v. Birnie*, 7 Bing. 339.

(d) *Fitt v. Cassanett*, 4 M. & G. 898.

(e) *Hoare v. Rennie*, 29 L. J. Ex. 73 ; 5 H. & N. 19 ; explained in *Mersey Steel Co. v. Naylor* (1884), 53 L. J. Q. B. 497 ; 9 A. C. 434.

(f) *Honck v. Muller*, 50 L. J. Q. B. 529 ; 7 Q. B. D. 104.

If a contract, say, for the delivery of 1,000 tons of iron, by ten equal instalments, be construed as what is called one entire contract to supply 1,000 tons in a specified time, then, if the contract cannot be performed in the manner specified, the party failed against may refuse to have any other arrangement substituted; and just as he might decline to accept 900 tons when he had contracted for 1,000 to be delivered all at one time, so he may refuse to accept 900 when he had contracted for 1,000 to be delivered at stated times. And if the contract be so construed, and cannot be performed strictly according to its terms, then the party failed against may rescind the contract or bring his action. This, possibly, was the view which the Court took of the contract in *Hoare v. Rennie* (a).

But if the contract be construed as a promise by one party to do a series of acts, *i.e.*, to deliver instalments, it seems impossible to say that if there is a failure to do one of those acts, there is a total failure of the consideration for the other party's promises such as would justify the other party in rescinding (b).

"The rule of law is, that all things to be performed by a party to an agreement on his part, are the consideration for all to be performed by the other party" (c).

Which of these is the true construction of the contract may be a question of some difficulty, but when damages are a sufficient recompense for a partial failure, it seems difficult to suppose that the parties intended that either of them should have any such disproportionate remedy as a power to rescind the contract.

No doubt the remedy by way of damages may prove to be inadequate, as in the case of the insolvency of the party in default; but that is a contingency which is unavoidable where this course of dealing is adopted.

Where the failure of one party to perform one of the acts

(a) *Hoare v. Rennie*, 29 L. J. Ex. 73; 5 H. & N. 19.

(b) *Boone v. Eyre*, 2 W. Bl. 1312; 1 H. Bl. 273, n.; and *ante*, p. 212.

(c) *Per Bramwell, B.*, in *Sanderson v. Graves*, 44 L. J. Ex. 310; L. R. 10 Ex. 237.

promised to be done is such that the other party is justified in concluding that the party failing wishes to rescind, then he may elect to rescind. The evidence from which an intention on the part of the person failing to abandon the contract may be inferred by the other party may be of various kinds, as insolvency, or long delay after the other party has given notice of his wish to abandon it, or an express notice; for just in the same way that where one party gives notice that he does not intend to perform his part of the contract, the other may take him at his word, and elect to consider his refusal as a breach (*a*), so he may elect to rescind. And there does not seem to be any distinction, as a matter of evidence, between a failure as to the first instalment or a failure as to some subsequent instalment (*b*), for the part performance, by accepting the prior instalments, being according to the contract, is consistent with either construction.

It has been argued that if the seller retakes possession of the goods after having delivered them, that is evidence from which an intention to rescind the contract may be gathered; but this has been decided not to be the case (*c*).

If goods have been delivered according to contract, and then, in consequence of the buyer's conduct, the seller elects to rescind the contract, the seller cannot bring an action upon the contract for the price of the goods delivered, for it is gone, but can recover whatever he can prove to be the value of the goods (*d*).

Withers v. Reynolds (*e*), in 1831, was an action for damages for not delivering straw. Reynolds, the defendant, had contracted to supply Withers, the plaintiff, with straw at the rate of three loads a fortnight, from October to the following June, payment on delivery. He supplied the straw up to

(*a*) *Cort v. Ambergate Ry. Co.*, 20 L. J. Q. B. 460; 17 Q. B. 127, *post*, p. 524.

(*b*) *Per Brett, L. J.*, in *Honck v. Muller*, 50 L. J. Q. B. 529; 7 Q. B. D. 104.

(*c*) *Stephens v. Wilkinson*, in 1831, 2 B. & Ad. 320; *Gillard v. Brittan*, in 1841, 8 M. & W. 575; *Page v. Cowasjee*, in 1866, L. R. 1 P. C. 127; 3 Moore, P. C. C. N. S. 499.

(*d*) *Bartholomew v. Markwick*, in 1864, 33 L. J. C. P. 145; 15 C. B. N. S. 710.

(*e*) *Withers v. Reynolds*, 2 B. & Ad. 882.

January, when Withers, who had paid for all that had been delivered except the last load, said that in future he should always keep one load in hand. Reynolds then refused to deliver any more straw unless it was paid for on delivery. Lord Tenterden, C. J., and Parke, Taunton and Patteson, JJ., held that when the plaintiff said he would not pay on delivery, the defendant was not obliged to go on supplying him. Patteson, J., said: "If the plaintiff had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw; but the plaintiff here expressly refuses to pay for the loads as delivered."

In *Hoare v. Rennie* (a), in 1859, the plaintiffs contracted to deliver a certain quantity of iron in four equal monthly instalments. They delivered practically nothing in the first month, and the defendants refused to take any of the iron. The case was heard on demurrer, and the Court held that the plaintiffs could not recover. It is, however, more than doubtful whether the Court would put the same construction on this contract as reported if the same case were ever tried again.

In *Jonassohn v. Young* (b), in 1863, the plaintiffs agreed to sell to the defendant as much gas coal equal to sample, as a certain steamship could carry from Sunderland to London in nine months. The plaintiffs said that the defendant after taking part of the coal refused to send the ship to take any more. The defendant pleaded that the coal delivered by the plaintiffs was not equal to sample, and that the plaintiffs had detained the ship longer than necessary. On demurrer the Court, consisting of Wightman, Crompton, and Blackburn, JJ., held that the plea was no answer to the declaration.

In *Simpson v. Crippin* (c), in 1872, the defendants agreed to sell to the plaintiffs 6,000 to 8,000 tons of coal, to be delivered into wagons to be sent by the plaintiffs to the defendants' collieries, in equal monthly quantities during a

(a) *Hoare v. Rennie*, 29 L. J. Ex. 73; 5 H. & N. 19, *ante*, p. 236.

(b) *Jonassohn v. Young*, 32 L. J. Q. B. 285; 4 B. & S. 296.

(c) *Simpson v. Crippin*, 42 L. J. Q. B. 28; L. R. 8 Q. B. 14, *ante*, p. 238.

period of twelve months. During the first month the plaintiffs sent wagons for 158 tons only, instead of at least 500. The defendants, at the expiration of the month, gave notice that, as the regular and punctual withdrawal of the stipulated quantity in each month was the sole inducement for them to entertain the contract, they now cancelled it, and refused to deliver any more coal. The Court of Queen's Bench held that the defendants were not entitled to do so, notwithstanding the plaintiffs' breach.

It should be observed that by section 39 (2) of the Sale of Goods Act, "Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer." This subsection is declaratory and is based on the law as laid down in the following case.

In *Ex parte Chalmers* (a), in 1873, the facts were that Hall and Co. contracted to sell Edwards 330 tons of bleaching powder, to be delivered at the rate of thirty tons a month from February to December, both inclusive, payment by cash fourteen days after each delivery. All the deliveries up to and including the October one were delivered and paid for: the November instalment was delivered, but not paid for. On the 20th of December Edwards became insolvent, and on the 23rd of December Hall and Co. wrote to him, "We give you notice that we refuse to deliver any more bleaching powder upon your contract." The December instalment was not delivered. Edwards was adjudicated bankrupt, and Chalmers, as trustee, claimed the delivery of thirty tons of bleaching powder; and on Hall and Co.'s refusal, he claimed 150*l.* damages.

The Court held he could not do so. Sir G. Mellish, L. J., delivered a judgment in which Lord Selborne, L. C., and Sir W. M. James, L. J., concurred. He said: "The first question that arises is, what are the rights of a seller of goods when

(a) *Ex p. Chalmers*, 42 L. J. Ch. 37; 8 Ch. App. 289.

“the purchaser becomes insolvent before the contract for sale has been completely performed? I am of opinion that the result of the authorities is this—that in such a case the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and that if a debt is due to him for goods already delivered he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered. . . . I agree with what was said by Crompton, J., in *Griffiths v. Perry* (a), that the mere fact of the insolvency of the purchaser did not put an end to the contract. It certainly would be very unfair if it had that effect” (b).

In *Morgan v. Bain* (c), in 1874, the defendants had, on the 5th of February, contracted to sell to the plaintiffs 200 tons of iron. On the 12th of March, the plaintiffs, finding themselves unable to meet their liabilities, determined to suspend payment, and informed the defendants of the fact on the 14th of March. On the 5th of April the first meeting of the creditors was held, at which it was agreed to accept a composition of five shillings in the pound. The plaintiffs did not refer to their contract with the defendants in their statement of affairs, but it was known to those present at the meeting. By the 1st of May three new partners had joined the plaintiffs' firm, and as iron had risen, they, on the 13th of May, demanded a delivery of the iron pursuant to the contract. The defendants at once repudiated the contract. It was stated in argument that by the usage of the iron trade no delivery would be due under the contract until the 1st of April. Lord Coleridge, C. J., delivering judgment for the defendants, said: “The question that is raised for our consideration is, whether, on the 13th of May, there had been

(a) *Griffiths v. Perry*, 28 L. J. Q. B. 204; 1 E. & E. 688.

(b) As to what justifies a seller in considering the buyer to be insolvent, see *In re Phoenix Bessemer Steel Co., Ex p. Curnforth Hæmatite Iron Co.*, in 1876, 46 L. J. Ch. 115; 4 Ch. D. 108; and *ante*, p. 413.

(c) *Morgan v. Bain*, 44 L. J. C. P. 47; L. R. 10 C. P. 15.

“a rescission of the contract. Rescission must be by both parties; either both must have intended to rescind, or one must have so acted as to justify the other in thinking that he intended to rescind. . . . Non-payment for one or two instalments of the iron would not be, *per se*, conduct justifying the conclusion on the vendor's part that the purchaser intended to abandon the contract. There might, however, be additional circumstances in connection with which such non-payment would be sufficient to justify such a conclusion on the vendor's part. Here the purchaser was insolvent. It would be, it appears to me, in accordance with what I have before said as to the law on this subject, the duty of the insolvent purchaser, if he meant to insist on the contract, to claim delivery of the instalments from time to time as they became due, and to offer cash in payment for them.”

In the case of *Ex parte Stapleton (a)*, in the Court of Appeal in 1879, Stapleton contracted to sell to Nathan a cargo of maize; subsequently, on the 19th of January, Nathan filed a liquidation petition, and a receiver was appointed, and a correspondence took place between Stapleton and the receiver. On the 31st of January Stapleton wrote to the receiver, “I propose to sell at a time when I shall consider most advisable, and then claim on the estate for the loss. Have you any proposal to make?”

On the 6th of February, the market being a falling one, Stapleton contracted to sell the cargo to Schroder and Co. for 688*l.* less than Nathan had contracted to pay. On the 7th of February, the receiver wrote to inform Stapleton that he had no right to deal with the cargo, before tendering it to him. On the 8th, Stapleton tendered it, and the receiver, on the 12th, wrote, that as Stapleton had resold before tendering, he reserved his right to regard the contract as cancelled. Stapleton tendered a proof against the estate of Nathan for 688*l.* The Court allowed the claim. Jessel, M. R., said: “I am of opinion that if a person who has entered into a

(a) *Ex p. Stapleton*, 10 Ch. D. 586.

“contract of this kind gives to the vendor before he has parted with the goods that which amounts in effect to this notice: ‘I have parted with all my property, and am unable to pay the price agreed upon,’ it is equivalent to a repudiation of the contract. Of course that would not affect the right of the trustee in liquidation to elect to fulfil the contract on paying the price in cash, provided that he does so within a reasonable time. But, if he does not do that, I think that the vendor is entitled to treat the contract as broken, without making any tender of the goods to the trustee.”

In *Freeth v. Burr* (a), in 1874, the facts were that on the 28th of November, 1871, the plaintiffs agreed to buy of the defendants 250 tons of pig iron, “half to be delivered in two weeks, remainder in four weeks. Payment, net cash fourteen days after delivery of each parcel.” The market was a rising one. No iron was delivered until the 15th of February, when 10½ tons were sent to the plaintiffs, who complained of the unpunctual deliveries, and inquired whether the defendant would deliver the remainder of the iron, or whether they should buy in against him; the defendant said it was his intention to deliver the remainder. On the 29th of May, 125 tons had been delivered, and the defendant asked for payment for them, promising to deliver the remainder. The plaintiffs declined to pay, under the belief that they were entitled to deduct from the amount due to the defendant any loss which they might incur in case the defendant should fail to deliver the remainder of the iron, and in reply to a letter from the defendant demanding payment, put forward a claim for 250*l.*, being 2*l.* per ton on the 125 tons undelivered. The plaintiffs ultimately (but not until after an action had been brought to recover the price) paid for the 125 tons delivered, and then brought this action for the refusal to deliver the remaining 125 tons, and obtained a verdict subject to the opinion of the Court. The Court upheld the verdict, and Lord Coleridge, C. J., said that “in cases of this sort, where the question is

(a) *Freeth v. Burr*, 43 L. J. C. P. 91; L. R. 9 C. P. 208.

“whether the one party is set free by the action of the other, “the real matter for consideration is whether acts or conduct “of the one do or do not amount to an intimation of an “intention to abandon and altogether to refuse performance “of the contract. The true question is, whether the acts “and conduct of the party evince an intention no longer to “be bound by the contract.” And this statement was frequently approved in the case of *Mersey Steel and Iron Co. v. Naylor (a)* in the House of Lords in 1884.

In *Bloomer v. Bernstein (b)*, in 1874, the plaintiff had agreed to buy from 3,650 to 5,110 tons of old iron rails, “delivery to take place during 1872, and to be completed in “December of that year, payment, net cash against bill of “lading.” On the 27th of January the defendant sent the plaintiff an invoice for 257 tons amounting to 1,390*l.*, which sum was paid by the plaintiff, and he received the bill of lading. On the 31st of January an invoice was sent to the plaintiff for a further quantity of rails amounting to 907*l.*, but the plaintiff did not take up the bills of lading. On the 7th of February the defendant gave notice that if the bills of lading were not taken up the iron would be sold. On the 13th of February it was sold in a rising market, for a sum greater than the contract price. On the 14th of February the defendant informed the plaintiff that as he had not taken up the bills of lading the contract would be cancelled. A correspondence followed, and finally on the 19th of February the plaintiff wrote to the defendant saying that if the iron was not delivered he would buy in against him. On the 20th of February the defendant again said that the contract was rescinded. The plaintiff filed a petition for liquidation on the 22nd of February. The creditors determined to have nothing to do with the plaintiff’s contracts, and on the 28th of June, after a composition had been accepted, reassigned to the plaintiff his estate. On the 23rd of July the plaintiff wrote to the defendant demanding a renewal of the deliveries.

(a) *Mersey Steel and Iron Co. v. Naylor*, 53 L. J. Q. B. 497; 9 App. Ca. 434.

(b) *Bloomer v. Bernstein*, 43 L. J. C. P. 375; L. R. 9 C. P. 588.

No demand had been made between February and July, and it was held by Lord Coleridge, C. J., Brett and Grove, JJ., that the defendant was justified in repudiating the contract, the jury having found that a state of things had existed which justified the defendants in believing that the contract was intended to be put an end to by the plaintiff.

In *Brandt v. Lawrence (a)*, in 1876, the defendant having contracted with the plaintiff to purchase a large quantity of oats to be shipped by steamer or steamers, refused to accept both shiploads on the ground that they had not been shipped within the stipulated time. The jury found that the first ship had been loaded in time but not the second, and the Court held that he was bound to accept the first, for when it was tendered there was nothing to show that the plaintiff would not or could not complete the contract.

In *Oleaga v. West Cumberland Iron and Steel Co. (b)*, in 1879, the contract was for the sale of a certain quantity of Spanish iron ore, to be delivered by instalments when freights should be below a certain limit. Partly through freights being above the limit, and partly through wars in Spain, a large quantity was undelivered long after the expiration of the time within which all would have been delivered but for those circumstances. The defendants refused to accept any more. But the Court seems to have been of opinion that they were bound to accept deliveries postponed by reason of high freights.

In *Honck v. Muller (c)*, in 1881, the defendant had, in October, 1879, agreed to sell and deliver to the plaintiff 2,000 tons of pig iron "in November, 1879, or equally over "November, December, and January next at 6*d.* per ton "extra." On the 1st of November the defendant wrote to the plaintiff's agent asking if he would take the whole of the iron in November; a correspondence passed, and on the 22nd of November the plaintiff's agent wrote to the defendant

(a) *Brandt v. Lawrence*, 46 L. J. Q. B. 237; 1 Q. B. D. 344, *ante*, p. 248; see also *Reuter v. Sala* (1879), 48 L. J. C. P. 492; 4 C. P. D. 239.

(b) *Oleaga v. West Cumberland Iron and Steel Co.*, L. R. 4 Q. B. D. 472.

(c) *Honck v. Muller*, 50 L. J. Q. B. 529; 7 Q. B. D. 92.

asking him to defer shipping any of the iron until December so as to allow the plaintiff to take delivery of all in December and January. The defendant replied on the 1st of December that he had cancelled the contract; to which the plaintiff answered that he declined to consider the contract rescinded. Field, J., at the trial, held that the plaintiff was entitled to recover, but in the Court of Appeal, Bramwell and Baggallay, L. JJ., were of opinion that the plaintiff had no cause of action, Brett, L. J., dissenting.

In *Mersey Steel and Iron Co. v. Naylor (a)*, in 1884, the respondents purchased from the appellants 5,000 tons of steel to be delivered in quantities of 1,000 tons per month, commencing in January, payment within three days after receipt of shipping documents. In January the appellants delivered only a part of the month's instalment, and early in February made a further delivery. Before payment became due a petition was presented for the winding up of the appellant company. The respondents did not pay the amount due, acting under the erroneous belief that they could not legally do so without leave of the Court. The liquidator made no further deliveries and brought an action for the price of the steel delivered.

Held, that payment for a previous delivery was not a condition precedent to the right to claim the next delivery, and that the respondents had not, by erroneously postponing payment, acted so as to show an intention to repudiate the contract and thus release the appellants from further performance.

Some of the above cases are not easy to reconcile, but it really amounts to a question of fact in each case, and section 31 of the Sale of Goods Act, after providing that "unless otherwise agreed the buyer of goods is not bound to accept delivery thereof by instalments," goes on to provide that "where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for,

(a) *Mersey Steel and Iron Co. v. Naylor*, 51 L. J. Q. B. 576; 9 Q. B. D. 648; 53 L. J. Q. B. 497; 9 App. Ca. 434. See also *Ebbw Vale Steel Co. v. Blaenau Iron Co.*, (1901) 6 Com. Cas. 33; *Braithwaite v. Foreign Hardwood Co.*, (1905) 2 K. B. 543.

“and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.”

The cases in which the buyer, though in default, was not insolvent are not necessarily authorities for the extent of the seller's rights, when there has been insolvency, and still less for the effects of stoppage *in transitu*. But the subjects are very closely connected, and if the one class of seller's rights was clearly and accurately defined, it would go far to settle the extent of the others.

If the seller had a right to rescind the contract after a default in the buyer, it would be very reasonable that he should have the same right on his insolvency before default, and that a stoppage *in transitu* should be considered as an election to exercise that right; but it is difficult to see how the seller could acquire a power to rescind the contract, by the act of putting the goods in motion, and then stopping them, if he had it not before.

The right to stop *in transitu* may, as we have seen, be exercised by the seller, although he is partially paid (*Hodgson v. Loy* (a)); or, although he has received bills for the full price which he has negotiated, and which are outstanding (*Feise v. Wray* (b)), and that without tendering or returning either the money or the bills (*Edwards v. Brewer* (c)). It seems very difficult to consider the stoppage *in transitu* as amounting to a rescission of the contract, when the seller may exercise it when he has not restored, and, as in *Feise v. Wray* (b), from his own insolvency, cannot restore the buyer to his original position. No such difficulty is in the way if the

(a) *Hodgson v. Loy*, 7 T. R. 455, *ante*, p. 354.

(b) *Feise v. Wray*, 3 East, 95, *ante*, p. 350.

(c) *Edwards v. Brewer*, 2 M. & W. 375.

stoppage is considered as doing no more than putting the seller in possession of the goods as a security.

In *Clay v. Harrison* (a), in 1829, which was an action on a policy of insurance, there had been an agreement for the supply of goods free on board. The seller shipped the goods accordingly, and by so doing appropriated them to the contract, and converted the agreement into a sale. The buyer insured his interest in the goods : they were damaged by one of the perils insured against ; then the buyer became insolvent, and the seller stopped the goods, already damaged, *in transitu*. The insurers contended that the stoppage *in transitu* rescinded the contract, and put an end to the buyer's interest in the goods, so that he had sustained no damage. The assignees contended that the bankrupt retained the general property in the goods. The King's Bench took time to consider, and decided in favour of the insurers ; but it appears from Mr. Baron Parke's statement, in *James v. Griffin* (b), that they decided it on the special ground, that in this case the only appropriation of the goods was that accompanying the parting with possession, and that, as the stoppage *in transitu* at all events put the party in the same position as if he had not parted with the possession, it must undo the appropriation that accompanied that parting with possession, so that the goods, which were in fact lying shattered and valueless on the beach at Elsinore, were, in contemplation of law, in the same position as if they had never left the seller's warehouses at St. Petersburg.

It seems a fair inference, that the Judges who adopted such a very artificial distinction, in order to avoid deciding what was the effect of stoppage *in transitu*, were not able to agree in forming their judgment on the general question.

In *Gibson v. Carruthers* (c), in 1841, the Court of Exchequer differed, in a case which, though not directly involving this point, yet threw considerable light on their Lordships'

(a) *Clay v. Harrison*, 10 B. & C. 99.

(b) *James v. Griffin*, 2 M. & W. 632.

(c) *Gibson v. Carruthers*, 11 L. J. Ex. 145 ; 8 M. & W. 321.

opinions upon it. In that case, Harris had agreed with Carruthers and Co., that he should charter a ship, and send her out to Odessa, that Carruthers and Co. should there load her with linseed, and have the bills of lading made out to their order, and that Harris should pay the price on the receipt of the invoice and bill of lading. Harris did send out the vessel, but became bankrupt before her arrival, and Carruthers and Co. refused to load the vessel. The question in the case was, whether the assignees of the bankrupt could maintain an action for this refusal. It is clear that no question about stoppage *in transitu* was directly involved in this; the goods were never even appropriated, far less put *in transitu*, and what the defendants sought was, to consider the insolvency an excuse for not proceeding with an executory contract. But the subject was analogous to that of stoppage *in transitu*, and Lord Abinger delivered a very interesting judgment, in which he assumes that Carruthers and Co. might, if they had put the goods on board, have altered the consignment and stopped them *in transitu*, and that if they had done so, it would have operated as a rescission of the contract, and on these assumptions he argues very convincingly that they must have a right to rescind the contract before putting the goods on board; for this, amongst other reasons, he thought that the plaintiffs could not recover. The other three Judges, Parke, B., Gurney, B., and Rolfe, B., were of a different opinion. They pointed out that there was not to be any *transitus*, properly so called, in this case, as Carruthers and Co. were to keep the control of the goods till payment, and they confine their judgment to the single point, that bankruptcy or insolvency does not by itself render an executory contract voidable, at the election of the solvent party. But though they in express words avoid deciding what the effect of stoppage *in transitu* would have been, it is not too much to say, that the tendency of their reasoning, and especially of that of Parke, B., is to show that stoppage *in transitu* does not do more than restore to the seller a security for the unpaid price, and does not rescind the contract.

In *Wentworth v. Outhwaite* (a), in 1842, the point was discussed before Lord Abinger, Parke, B., Alderson, B., and Rolfe, B., and the Court then, though not deciding the point, intimated that Lord Abinger thought that, subject to some qualifications, stoppage *in transitu* did operate as a rescission of the contract, and that the other three Judges were strongly inclined to think, that its effect was only to replace the seller in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price was paid down.

In that case the goods were despatched in two parcels, by two different carriers; one parcel was stopped *in transitu*, the other reached its destination. The question was, what effect this partial stoppage *in transitu* had upon the insolvent's property in the other parcel. Parke, B., in delivering the judgment of the Court, said: "What the effect of stoppage *in transitu* is, whether entirely to rescind the contract, or merely to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet finally decided, and there are difficulties attending each construction. If the latter supposition be adopted (as most of us are strongly inclined to think it ought to be, on the weight of authority), the vendor is entitled to retain the part actually stopped *in transitu*, till he is paid the price of the whole, but has no right to retake that which has arrived at its journey's end. His right of lien is reverted on the part stopped, but no more. My Lord Chief Baron has expressed an opinion, to which he still adheres, that the contract is rescinded by a stoppage *in transitu*, but he does not think that this affects the right of the vendee to retain that portion of the goods which have been actually delivered to him, or in other words, have reached the place of their destination, more especially when the goods and the price may be apportioned, as in the present case, and a new

(a) *Wentworth v. Outhwaite*, 12 L. J. Ex. 172; 10 M. & W. 436; considered in *Ex p. Chalmers* (1873), 42 L. J. Bk. 37; L. R. 8 Ch. 289,

“contract be implied from the actual delivery and retention
“of a part.”

It is to be observed, that Lord Abinger, whilst holding that stoppage *in transitu* rescinded the contract, yet did not hold that this rescission was complete, or to be followed by all the consequences which attend a rescission. He never had occasion during his life to explain what the precise force of these qualifications was, but it seems probable that he would, if called upon to explain his views, have said, as he hinted in *Gibson v. Carruthers* (a), that stoppage *in transitu* was an arbitrary rule, adopted for the advantage of trade, and that no common law phrase could exactly express its effect, but that “rescission” came nearest to it, but that such qualifications must be attached as were by usage found to be for the advantage of trade.

But, however doubtful it may have been formerly, it is clear law now that stoppage *in transitu* is not a rescission of the contract (b).

Hitherto the rights which the seller has over the goods before they have come into the buyer's possession, and the seller's right to withhold delivery, to stop *in transitu*, to retake possession, to resell and to rescind, have been the chief subject of investigation. It is now proposed to consider the other remedies which are available to the party failed against where there has been a breach of contract. These remedies are dealt with by the Sale of Goods Act as follows:—

“Section 49.—(1.) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

“(2.) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property

(a) *Gibson v. Carruthers*, 8 M. & W. 321, *ante*, p. 518.

(b) *Per Cairns, L. J.*, in *Schotsman v. Lanco. and Yorks. Ry. Co.*, 36 L. J. Ch. 366; L. R. 2 Ch. Ap. 340; and Sale of Goods Act, 1883, s. 48.

in the goods has not passed, and the goods have not been appropriated to the contract."

These two sub-sections deal with the seller's remedy where the buyer refuses to pay for the goods according to the terms of the contract. The following two sub-sections indicate the remedy where the buyer refuses to accept and pay for the goods :—

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Bk p 115
" 50.—(1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

" 51.—(1.) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery."

It is usual to speak of the failure of either party to do what he has promised to do as "a breach of the contract." Correctly speaking, it is the promise to do so something which has been broken; the contract with all its liabilities remains binding.

In the first place, it will be desirable to refer to the effect which a condition precedent has upon the position of the parties. In the case of a simple sale the buyer cannot be called upon to pay the price of the goods until the two implied conditions precedent, viz., that the property in the goods shall have been passed to him, and that the seller shall have delivered or tendered them, shall have been performed. If there are no special terms in the contract the property passes to the buyer as soon as the bargain is concluded, and the goods are then at the buyer's risk and he must pay for them; but it may be that the parties to the contract have agreed that the property shall not pass until some event has happened. In such a case the happening of that event is a condition precedent to the passing of the property, and to the buyer's obligation to pay.

When the property has passed, the buyer is not liable to pay for the goods until the seller delivers or tenders them. But if the seller is unable to tender them, in consequence of the goods having perished, he is in law released from his

obligation to tender, and the buyer must pay for the undelivered goods if the property had passed to him, on the principle laid down in *Taylor v. Caldwell* (a), in 1863, "The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied, that the impossibility arising from the perishing of the person or thing shall excuse the performance (b)."

If the party who has the right to avail himself of a condition precedent has waived it, or prevented it from happening or being performed (c), he cannot afterwards avail himself of it. If the buyer refuses before the seller tenders the goods to accept them when tendered, the seller may at once elect to consider the buyer's refusal as a breach of contract, and bring his action for damages for the breach before the time for performance has arrived, or the seller may decline to consider the refusal as a breach, and in that case the contract cannot be considered as broken, and each party is bound to do all that he has undertaken to do (d). If the seller or the buyer refuse to perform his part, the other party need not actually tender the goods or the price. He shows a good cause of action if he can prove that he was ready and willing to do so.

In the case of *Ripley v. McClure* (e), in 1849, the contract was, that the plaintiff, to whom a cargo of tea was to be consigned from China, was to sell and deliver one-third of it to the defendant in Belfast as soon as it should arrive there. Before the arrival of the cargo the defendant became dissatisfied with the contract, and a correspondence ensued, from which the plaintiff concluded that the defendant did not intend to fulfil his contract, and sold the tea on its arrival without tendering, and brought this action against him for breach of contract. In delivering the judgment of the

(a) *Taylor v. Caldwell*, 32 L. J. Q. B. 164; 3 B. & S. 826.

(b) See the cases mentioned in the note, *ante*, p. 251.

(c) *Mackay v. Dick*, 6 App. Ca. 251.

(d) *Post*, p. 525.

(e) *Ripley v. McClure*, 18 L. J. Ex. 419; 4 Ex. 345.

Court on the motion for a new trial, Parke, B., said that the question left to the jury was, "Whether there was a refusal at any time, and whether that refusal had been subsequently retracted; and the jury having found, as we think they were warranted by the evidence to do, that it had not, there was certainly evidence of a continual refusal down to and inclusive of the time when the defendant was bound to receive, which would render the defendant liable, if all the conditions precedent had been performed or waived (a)." And when Lord Campbell, C. J., was delivering judgment in *Cort v. Ambergate Railway Co.* (b), he said that it was decided in *Ripley v. M'Clure* (c), "that a refusal by the defendant before the arrival of the cargo to perform the contract was not of itself necessarily a breach of it, but that such refusal, unretracted down to and inclusive of the time when the defendant was bound to receive the cargo, was evidence of a continuing refusal and a waiver of the condition precedent of delivery, so as to render the defendant liable for the breach of contract."

Next came the leading case of *Cort v. Ambergate Railway Co.* (b), in 1851, where the plaintiffs had contracted to supply the defendants with a large quantity of railway chairs. They delivered some of them, and then the defendants declined to receive any more. For the purpose of enabling themselves to carry out their contract, the plaintiffs had gone to considerable expense in buildings. The plaintiffs sued the defendants for damages for not accepting, and the defendants pleaded by way of defence that the plaintiffs had never tendered the chairs, and that they had not been prevented from doing so by them. Lord Campbell, C. J., on the motion for a new trial, said it was not denied that if the defendants would have accepted and paid for the chairs the plaintiffs would have supplied them, and continued: "We are of opinion, however, that the jury were fully justified upon the evidence in finding that the plaintiffs were ready and

(a) See also *Planché v. Colburn*, 8 Bing. 14.

(b) *Cort v. Ambergate Ry. Co.*, 20 L. J. Q. B. 460; 17 Q. B. 127.

(c) *Ripley v. M'Clure*, 18 L. J. Ex. 419; 4 Ex. 345.

“willing to perform the contract, although they never made
“and tendered the residue of the chairs.”

In *Frost v. Knight* (a), in 1872, Cockburn, C. J., delivering a judgment in which Keating and Lush, JJ., concurred, said (b): “The law with reference to a contract to be
“performed at a future time where the party bound to per-
“formance announces prior to the time his intention not to
“perform it, as established by the cases of *Hochster v. De*
“*la Tour* (c), and the *Danube and Black Sea Company v.*
“*Zenos* (d), on the one hand, and *Avery v. Bowden* (e), *Reid*
“*v. Hoskins* (f), and *Barwick v. Buba* (g), on the other, may
“be thus stated. The promisee, if he pleases, may treat the
“notice of intention as inoperative, and await the time when
“the contract is to be executed and then hold the other party
“responsible for all the consequences of non-performance.
“But in that case he keeps the contract alive for the benefit
“of the other party as well as his own; he remains subject
“to all his own obligations and liabilities under it, and
“enables the other party not only to complete the contract if
“so advised, notwithstanding his previous repudiation of it,
“but also to take advantage of any supervening circumstance
“which would justify him in declining to complete it.

“On the other hand, the promisee may, if he thinks
“proper, treat the repudiation of the other party as a
“wrongful putting an end to the contract, and may at once
“bring his action as on a breach of it; and in such an
“action he will be entitled to such damages as would have
“arisen from the non-performance of the contract at the
“appointed time, subject, however, to abatement in respect
“of any circumstances which may have afforded him the

(a) *Frost v. Knight*, 39 L. J. Ex. 277; 41 L. J. Ex. 78; L. R. 5 Ex. 322; L. R. 7 Ex. 111.

(b) 41 L. J. Ex. 79; L. R. 7 Ex. 112.

(c) *Hochster v. De la Tour*, 22 L. J. Q. B. 455; 2 E. & B. 678.

(d) *Danube and Black Sea Co. v. Zenos*, 31 L. J. C. P. 84; 31 L. J. C. P. 284
11 C. B. N. S. 152; 13 C. B. N. S. 825.

(e) *Avery v. Bowden*, 26 L. J. Q. B. 3; 6 E. & B. 953.

(f) *Reid v. Hoskins*, 26 L. J. Q. B. 5; 6 E. & B. 953.

(g) *Barwick v. Buba*, 26 L. J. C. P. 280; 2 C. B. N. S. 563.

"means of mitigating his loss." The words "a wrongful putting an end to the contract" were probably used only in the sense of breaking the contract and not as rescinding it.

But there is nothing to prevent the parties from introducing into their agreement any stipulations or conditions they may think desirable: and these stipulations may make the obligation of either party to be independent of what would otherwise have been an implied condition precedent (*a*).

Thus, if the parties think well to agree to it, they may agree that the buyer shall pay the price at once, and this quite independently of where the property is, and of whether the goods have been tendered or not. And on the other hand, they may agree that the buyer shall not be called upon to pay the price, although the property has passed to him and the goods have been delivered, until the happening of some event, as in the case of a sale on credit.

The extent to which the obligations of the parties are within their own control may be seen from the judgment of Blackburn, J., in the case of the *Calcutta Co. v. De Mattos* (*b*), cited on page 256.

In *Dunlop v. Grote* (*c*), in 1845, the defendants had, in March, contracted to buy from the plaintiffs 1,000 tons of iron to be delivered before the end of April, "and if the delivery of the said iron should not be required by the defendants on or before the 30th day of April then next ensuing, the said iron was to be paid for by the defendants on the day and year last aforesaid." The defendants paid a portion of the price and refused to pay the balance. Cresswell, J., held that the plaintiffs were entitled to recover the whole sum (*d*).

And in *Castle v. Playford* (*e*), in 1870, the defendant agreed to purchase from the plaintiffs a quantity of ice, the sellers "forwarding bills of lading to the purchaser; and

(*a*) Sale of Goods Act, s. 27.

(*b*) *The Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 321.

(*c*) *Dunlop v. Grote*, 2 Car. & Kir. 153.

(*d*) Section 49 (2) of the Sale of Goods Act (*ante*, p. 521).

(*e*) *Castle v. Playford*, 39 L. J. Ex. 150; L. R. 5 Ex. 165; 41 L. J. Ex. 44; L. R. 7 Ex. 98.

"upon receipt thereof the said purchaser takes upon himself
"all risks and dangers of the seas, rivers, and navigation
"of whatever nature or kind soever; and the said H. H.
"Playford agrees to buy and receive the said ice on its arrival
"at ordered port . . . and to pay for the same in cash on
"delivery, at and after the rate of 20s. sterling per ton of
"20 cwt. weighed on board during delivery." . . . The
plaintiffs shipped a cargo, and forwarded the bill of lading
to the defendant, by whom it was received.

The ice was lost during the voyage and the defendant refused to pay for it. It was held on appeal by Cockburn, C. J., Willes, Blackburn, Mellor, Brett, and Grove, JJ., that he was bound to pay for it: Blackburn, J., saying: "The
"parties in this case have agreed, whether the property
"passed or not, that the purchaser should, from the time he
"received the bills of lading, take upon himself all risks and
"dangers of the seas; and . . . I do not see what risk he
"took upon himself at all, unless it was this, that he said :
" 'If the property perishes by the dangers of the seas, I shall
" 'take the risk of having lost the property, whether it be
" 'mine or not.' " (a).

It may be that although the condition precedent which has not been performed was something to be performed by one of the parties to the contract, yet if it was merely a condition, and not accompanied by a promise by that party to perform it, that party will not be liable to the other for the non-performance. The question is simply, has that person promised to perform it, or promised or undertaken that it shall be performed; if he has, he is liable in damages if he does not perform it or it is not performed. If the contract was merely that if he performs it or if it happens then certain results are to follow, he is not liable.

The Sale of Goods Act, by section 5 (2), provides that:—

"There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen."

(a) See also *Martineau v. Küchiny*, 41 L. J. Q. B. 227; L. R. 7 Q. B. 436, *ante*, p. 192; and *Tregelles v. Sewell*, 7 H. & N. 574, *ante*, p. 235.

In *Boyd v. Siffkin* (a), in 1809, the buyer sued the seller for not delivering hemp which by the contract was to be delivered when it should arrive by a certain vessel. The vessel arrived but with no hemp on board, and the plaintiff was nonsuited (b).

Vernede v. Weber (c), in 1856, was an action for not delivering. The contract was in these terms, "Bought for account of Messrs. Vernede and Company, of Mr. C. F. Weber, the cargo of 400 tons (provided the same be shipped for sellers' account), more or less, Aracan Necrensie rice . . . at 11s. 6d. for Necrensie, or at 11s. for Larong, the latter quantity not to exceed 50 tons." The cargo was found on arrival to consist of 285 tons of Larong and 159 tons of Latourie; and the plaintiffs alleged as the defendants' breach of contract, that the cargo was not Aracan Necrensie; but the Court of Exchequer was of opinion, that there was no absolute warranty that the rice which was shipped should be Aracan Necrensie, but was subject to the proviso that such a cargo should be shipped (d).

These cases may be contrasted with *Hale v. Rawson* (e), in 1858, which was an absolute contract to deliver, provided the ship should arrive, whether the goods were on board or not. The ship arrived, but with no goods on board, and the buyer brought this action for damages for not delivering goods according to contract. The sale was of 50 cases of East India tallow, to be delivered on the safe arrival of the *Countess of Elgin*. The defendants pleaded that the ship had arrived without any tallow on board without any negligence on their part. The plaintiffs demurred, on the ground that the defendants had contracted to deliver unconditionally.

(a) *Boyd v. Siffkin*, 2 Camp. 326.

(b) See *ante*, p. 252; and *Hawes v. Humble*, 2 Camp. 327, n.; *Idle v. Thornton*, 3 Camp. 274; *Johnson v. Macdonald*, 12 L. J. Ex. 99; 9 M. & W. 601; *Lovatt v. Hamilton*, 5 M. & W. 639.

(c) *Vernede v. Weber*, 25 L. J. Ex. 326; 1 H. & N. 311.

(d) See also *Smith v. Myers*, 39 L. J. Q. B. 210; 41 L. J. Q. B. 91; L. R. 5 Q. B. 429; L. R. 7 Q. B. 139, *ante*, p. 259 and other cases on conditions precedent.

(e) *Hale v. Rawson*, 27 L. J. C. P. 189; 4 C. B. N. S. 85

The Court gave judgment for the plaintiffs, saying that “where the agreement is absolute, or conditional on an event which happens, the vendor will be liable for a breach, although he could not help the non-performance (a).”

And it is for the person who wishes to avail himself of his rights which are dependent on the happening of a condition precedent to show that the condition has happened, or that the happening of it has been prevented by the opposite party.

Sect. 28 of the Sale of Goods Act provides that:—

“Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price; and the buyer must be ready and willing to pay the price in exchange for possession of the goods.”

In *Atkinson v. Smith* (b), in 1845, the defendants had agreed to purchase from the plaintiffs 30 packs of Cheviot fleeces, and to accept a bill for 250*l.* and deliver to the plaintiffs some coarse woollen cloths called noils. The plaintiffs delivered a part only of the fleeces; and the Court held that the contracts were not independent, and that the plaintiffs could not sue the defendants for non-delivery of some of the noils, without proof of delivery or tender of the rest of the fleeces.

And in *Bankart v. Bowers* (c), in 1866, by agreement the plaintiff was to purchase certain lands and minerals from the defendant, and the defendant was to purchase from the plaintiff all the coal he might require from time to time at a fair market rate. The Court held that the acts were to be concurrent, and that the plaintiff could not sue the defendant for not taking the coals without performing his part of the agreement.

Having considered shortly the effect of express stipulations

(a) See also *Gorriessen v. Perrin*, 27 L. J. C. P. 29; 2 C. B. N. S. 681.

(b) *Atkinson v. Smith*, 15 L. J. Ex. 59; 14 M. & W. 695. See also *Brogden v. Marriott*, 2 Bing. N. C. 473, in 1836, 3 Bing. N. C. 88; *Thurnell v. Balbirnie*, 2 M. & W. 786, in 1837.

(c) *Bankart v. Bowers*, L. R. 1 C. P. 484.

as to payment, delivery, &c., on the remedies of the parties, it is proposed now to consider in what way the parties may assert their rights, and it will be convenient in the first place to consider the position of the buyer where the seller does not tender the goods. The buyer may in some very exceptional cases compel the seller to perform his contract specifically, that is, to deliver those very goods; but generally speaking he cannot do so, the rule being that where damages will afford an adequate compensation for the breach, the buyer cannot get a decree for specific performance. Cases where specific performance has been decreed are so uncommon that it is sufficient here to refer to the case of *Cuddee v. Rutter* in White and Tudor's Leading Cases in Equity, Vol. I., where the learning on the subject will be found.

By section 2 of the Mercantile Law Amendment Act of 1856 (a), it was enacted that, "In all actions and suits for breach of contract to deliver specific goods for a price in money, on the application of the plaintiff, and by leave of the Judge before whom the cause is tried, the jury shall, if they find the plaintiff entitled to recover, find by their verdict what are the goods in respect of the non-delivery of which the plaintiff is entitled to recover and which remain undelivered; what (if any) is the sum the plaintiff would have been liable to pay for the delivery thereof; what damages (if any) the plaintiff would have sustained if the goods should be delivered under execution, as hereinafter mentioned, and what damages if not so delivered; and thereupon, if judgment shall be given for the plaintiff, the Court or any Judge thereof, at their or his discretion, on the application of the plaintiff, shall have power to order execution to issue for the delivery, on payment of such sum (if any) as shall have been found to be payable by the plaintiff as aforesaid, of the said goods, without giving the defendant the option of retaining the same upon paying the damages assessed; and such writ of execution may be for the delivery of such goods; and if such goods so ordered to

(a) 19 & 20 Vict. c. 97.

“ be delivered, or any part thereof, cannot be found, and unless
“ the Court, or such Judge as aforesaid, shall otherwise order,
“ the sheriff, or other officer of such Court of Record, shall
“ distrain the defendant by all his lands and chattels in the
“ said sheriff’s bailiwick, or within the jurisdiction of such
“ other Court of Record till the defendant deliver such goods ;
“ or, at the option of the plaintiff, cause to be made of the
“ defendant’s goods the assessed value or damages, or a due
“ proportion thereof ; provided that the plaintiff shall, either
“ by the same or a separate writ of execution, be entitled to
“ have made of the defendant’s goods the damages, costs, and
“ interest in such action or suit.”

This section is reproduced in section 52 of the Sale of Goods Act, which provides that :—

“ In any action for breach of contract to deliver specific or
“ ascertained goods the Court may, if it thinks fit, on the
“ application of the plaintiff, by its judgment or decree direct
“ that the contract shall be performed specifically, without
“ giving the defendant the option of retaining the goods on
“ payment of damages. The judgment or decree may be
“ unconditional, or upon such terms and conditions as to
“ damages, payment of the price, and otherwise, as to the
“ Court may seem just, and the application by the plaintiff
“ may be made at any time before judgment or decree.

“ The provisions of this section shall be deemed to be
“ supplementary to, and not in derogation of, the right of
“ specific implement in Scotland.”

The buyer’s usual remedy where the seller fails to deliver, is an action to recover damages from him for his failure to deliver according to contract : of this many examples will be found in the chapter on Conditions Precedent. By the third section of the Common Law Procedure Act of 1852 (*a*), it became unnecessary to mention any form of action in the writ. Prior to that Act the writ stated whether the action was in trover or assumpsit, &c., and in reading the cases it is important to bear in mind that the plaintiff sometimes failed

(a) 15 & 16 Vict. c. 76.

in one form of action where he would have succeeded if he had brought it in another. Such a case merely showed that that particular form of action would not lie.

If both parties are in default, then neither party can bring his action against the other, if the performance by each party of his own undertaking is in law a condition precedent to the obligation of the other party to perform his undertaking, as in *Atkinson v. Smith* (a) and *Bankart v. Bowers* (b). But where the contracts are independent, then either party may bring his action against the other for non-performance, although he has not performed his own part.

If the price or any part of it has been paid, but the goods have not and should have been delivered, the money paid for the goods not delivered may be recovered back again, and by section 54 of the Sale of Goods Act it is provided that :—

“ Nothing in this Act shall affect the right of the buyer or
“ the seller to recover interest or special damages in any case
“ where by law interest or special damages may be recoverable,
“ or to recover money paid where the consideration for the
“ payment of it has failed.”

In *Devaux v. Conolly* (c), in 1849, the plaintiffs in London agreed to purchase from the defendant at Singapore, 175 tons of terra japonica, and gave their acceptances for the price on receipt of the bills of lading. When it arrived and was weighed there were 20 tons short, and the Court held that the plaintiffs were entitled to recover the amount overpaid as upon a partial failure of consideration.

Coras v. Bingham (d), in 1853, was an action in which the buyer sought to recover a part of the purchase-money which he had paid, the bought note being, “Messrs. John Bingham and Co., I have this day sold to you, for account of Mr. Stamaty Covas, the cargo per *Prima Donna* . . . now at “Queenstown, as it stands, consisting of about thirteen hundred

(a) *Atkinson v. Smith*, 15 L. J. Ex. 59; 14 M. & W. 695.

(b) *Bankart v. Bowers*, L. R. 1 Q. B. 484.

(c) *Devaux v. Conolly*, 19 L. J. C. P. 71; 8 C. B. 640.

(d) *Coras v. Bingham*, 23 L. J. Q. B. 26; 2 E. & B. 836.

"quarters Ibraila Indian corn, at the price of thirty shillings per imperial quarter . . . The quantity to be taken from the bill of lading." The quantity according to the bill of lading was 1667 $\frac{3}{4}$ quarters, for which amount the plaintiffs paid. But when the ship was unloaded, there turned out to be only 1614 $\frac{1}{2}$ qrs. on board, or about 53 qrs. less than the amount paid for. But the Court held that the buyer was bound to pay for the quantity named in the bill of lading, and ran the risk of that quantity being more or less than the actual quantity on board.

And corresponding to this remedy is the seller's right to sue the buyer for not accepting the goods (a); of this several examples will be found in the chapter on Conditions Precedent.

The case of *Chinery v. Viall* (b), in 1860, is an authority that the plaintiff cannot by suing in trover, get greater damages than by suing for damages for breach of contract. There the plaintiff had purchased from the defendant forty-eight sheep at fifty-three shillings each. He took away and paid for five of them, and some days afterwards he called for the remaining forty-three, and found that the defendant had resold them. The plaintiff then brought this action against the defendant, declaring in trover in one count, and in another for not delivering the sheep, and recovered a verdict for 118*l.* 19*s.*, the full value of the forty-three sheep on both counts. The jury also found that the actual damage sustained by the plaintiff was 5*l.* On the motion to reduce the verdict to 5*l.*, Bramwell, B., said, that the sheep had been resold before the buyer was in default, as it was a sale on credit, but that the plaintiff was not entitled to recover more in trover than the actual damage he had sustained, "the principle deducible from the authorities being that a man cannot by merely changing the form of action entitle himself to recover damages greater than the amount to which he is in law entitled, according to the true facts of

(a) Sale of Goods Act, s. 49 (1).

(b) *Chinery v. Viall*, 29 L. J. Ex. 180; 5 H. & N. 288.

"the case, and the real nature of the transaction. Here the result is that the plaintiff is entitled to recover 5*l.* only (a)."

Having considered the position of the parties where the seller has not tendered the goods, the next question is, what are their rights where the seller does tender? It will be convenient to examine in the first place those cases in which the property in the goods has passed to the buyer. In that case he cannot return them. After accepting them so that the property in them has passed to him, he cannot, when he comes to examine them and discovers they are not what he contracted for, call upon the seller to take them back again. The law on this point was laid down in the leading case of *Street v. Blay* (b), in 1831, which has been followed in many cases. There the plaintiff sold a horse to the defendant with a warranty of soundness, the defendant resold it to Bailey, who parted with it in exchange to Osborne, who sold it back to the defendant. The defendant then finding that the horse was unsound, returned it to the plaintiff. The horse was unsound at the time of the first sale. The Court held that the defendant could not compel the plaintiff to take back the horse, after having accepted it and resold it, which were acts of ownership inconsistent with the purposes of a trial.

In *Parsons v. Sexton* (c), in 1847, the seller sued for the price of an engine sold in the following circumstances:—The engine had been erected, and subsequently taken to pieces, and was lying in the plaintiff's works, where the defendants' foreman saw and examined it. The plaintiff then made an offer to sell it as follows: "I, James Parsons, do hereby agree to provide a fourteen-horse engine, and sixteen-horse boiler with fittings and everything complete, for the sum of 260*l.*" The defendants accepted on the terms following: "In consideration of your supplying us with a certain fourteen-horse engine which our foreman has inspected, &c." The engine was delivered at the defendants' works, but the plaintiff

(a) See also *Johnson v. Lancs. and Yorks. Ry. Co.*, 3 C. P. D. 499.

(b) *Street v. Blay*, 2 B. & Ad. 456.

(c) *Parsons v. Sexton*, 4 C. B. 899; 2 C. & K. 266.

was unable to make it work up to fourteen horse-power, and the defendants rejected it. It was held that, assuming there was a warranty as to power, and that there was a breach of it, that was not an answer to a claim for the price, although it might be the ground of a set-off or cross-action.

And in *Dawson v. Collis* (a), in 1851, where the sale was of 31 pockets of hops warranted equal to sample, the Court held that on the sale of a specific chattel the buyer cannot refuse to accept it because it is found not to correspond with the sample.

In delivering judgment in *Behn v. Burness* (b), in 1863, Williams, J., said, "Accordingly, if a specific thing has been sold with a warranty of its quality, under such circumstances that the property passes by the sale, the vendee having been thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken (unless there is a special stipulation to that effect in the contract, see *Bannerman v. White* (c)), but must have recourse to an action for damages in respect of the breach of warranty. But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or in other words, that the condition expressed in the contract has not been performed. Still, if he receives the thing sold, and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for a breach of which he may bring an action to recover damages."

In *Bannerman v. White* (c), in 1861, where the seller sued for the moiety of the price of hops delivered, which corresponded with the sample, but in the cultivation of which sulphur had been used, although at the time of the sale the

(a) *Dawson v. Collis*, 20 L. J. C. P. 116; 10 C. B. 523.

(b) *Behn v. Burness*, 32 L. J. Q. B. 204; 3 B. & S. 755; see also *Bentsen v. Taylor*, 63 L. J. Q. B. 15; [1893] 2 Q. B. 274.

(c) *Bannerman v. White*, 31 L. J. C. P. 28; 10 C. B. N. S. 844.

plaintiff had stated that sulphur had not been used, and it was admitted that the defendant would not have bought the hops if he had known this, the Court held that he might refuse to pay the price, as the intention of the parties was that if sulphur had been used there should be no contract. It was the condition upon which the defendant contracted.

When the buyer has accepted the goods, and subsequently finds that there has been a breach of warranty, or in other words, that the goods delivered are not in all respects what he contracted for, then, although he cannot return them and re-vest the property in the seller, he may bring an action for breach of warranty. And if he has not yet paid for them, he may wait until the seller sues him for the price, and then set up the seller's breach as matter in reduction of the seller's claim.

As already stated, the Sale of Goods Act provides that where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance, and the buyer has a like remedy in respect of non-delivery. Section 53 (1) of the Sale of Goods Act further provides that:—

“Where there is a breach of warranty by the seller, or
“where the buyer elects, or is compelled, to treat any breach
“of a condition on the part of a seller as a breach of warranty,
“the buyer is not by reason only of such breach of warranty
“entitled to reject the goods; but he may

“(a) set up against the seller the breach of warranty in
“diminution or extinction of the price; or

“(b) maintain an action against the seller for damages for
“the breach of warranty.”

In *Pateshall v. Tranter* (a), in 1835, where the buyer kept a horse, warranted sound, for several months, without notifying to the seller that it was unsound, it was held that he had not lost his right to sue on the warranty (b).

(a) *Pateshall v. Tranter*, 3 Ad. & El. 103.

(b) See also *Fielder v. Starkin*, 1 H. Bl. 17; *Buchanan v. Parnshaw*, 2 T. R.

In *Shepherd v. Kain* (a), in 1821, the defendant sold the plaintiff "a copper-fastened vessel," "as she now lies, to be "taken with all faults, without allowance for any defects "whatsoever." She was in fact only partially copper-fastened and was not what was known in the trade as a copper-fastened vessel, but the plaintiff had a full opportunity to examine her before buying her. The plaintiff brought this action for breach of warranty, instead of rejecting the ship, as he probably might have done, and obtained a verdict, which the Court refused to set aside, on the ground that "with all faults" meant with all faults consistent with the ship being a copper-fastened ship, whereas she was not a copper-fastened ship at all.

Taylor v. Bullen (b), in 1850, was a case very similar to *Shepherd v. Kain* (a). The sale was of a vessel as she lay, with all faults, but the defendant, who was the seller, had stipulated that no allowance should be made for "any defect "or error whatever." The Court held that there was no warranty, and gave judgment for the defendant, on the ground that if the vessel was not what she was warranted, the seller had either committed a fraud or an error; if a fraud, the plaintiff had another remedy; if merely an error, the defendant's liability was excluded by the terms of the contract.

In *Allan v. Lake* (c), in 1852, the defendant had sold turnip seed, which he warranted to be Skirving's Swedes. The seed turned out not to be such, and the plaintiff obtained a verdict for breach of warranty, which the Court upheld. Erle, C. J., said: "When the vendor gives a description of the properties "of an article, it is a question for the jury whether such a "description is a mere commendation of the article, or a "direct representation that he sells it as being the particular "article described."

And in *Wieler v. Schilizzi* (d), in 1856, the sale was of

(a) *Shepherd v. Kain*, 5 B. & Ald. 240.

(b) *Taylor v. Bullen*, 20 L. J. Ex. 21; 5 Ex. 779.

(c) *Allan v. Lake*, 18 Q. B. 560.

(d) *Wieler v. Schilizzi*, 25 L. J. C. P. 89; 17 C. B. 619.

"Calcutta linseed tale quale," but the seed was found to contain 15 per cent. of seeds which were not linseed. The question left to the jury was, whether there was such an admixture as to alter the distinctive character of the article, and the jury found a verdict for the plaintiff. This was held to be no misdirection.

In *Simond v. Braddon* (a), in 1857, the contract was:—"Bought for account of, &c., the following cargo of Arracan "rice, per *Severn*, &c. The cargo to consist of fair average "Niceranzi rice, the price of which is to be 11s. 6d. per cwt., "with a fair allowance for Larong, or any other inferior "description of rice (if any), but the seller engages to deliver "what is shipped on his account, and in conformity with his "invoice." The jury found that the rice delivered was not fair average Niceranzi rice, and the plaintiff obtained a verdict, which the Court upheld.

Cockburn, C. J., said that the contract amounted "to a "warranty on the part of the seller that the cargo should "consist of fair average Niceranzi rice, with a stipulation, "introduced for the benefit of the buyer, that he may, if he "chooses, take the cargo, such as it is, and claim a deduction "in price for the inferior quality" (b).

And in *Davis v. Hedges* (c), in 1871, it was decided by Hannen, Blackburn, and Lush, JJ., that the buyer is not bound to set up his damages when sued for the price, but may pay the full amount of the seller's claim, and is not prejudiced by having so done when he brings his action against the seller for breach of warranty.

The leading case on the subject that the buyer may set up his damages, in an action for the price by the seller, is *Mondel v. Steel* (d), in 1841. Parke, B., in delivering judgment, said: "Formerly it was the practice, where an action was "brought for an agreed price of a specific chattel sold with

(a) *Simond v. Braddon*, 26 L. J. C. P. 198; 2 C. B. N. S. 324.

(b) See also *Josling v. Kingsford*, in 1863, *ante*, p. 222; 32 L. J. C. P. 94; 13 C. B. N. S. 447.

(c) *Davis v. Hedges*, 40 L. J. Q. B. 276; L. R. 6 Q. B. 687; *Broom v. Davis*, cited 7 East, 480; *Cormack v. Gillis*, cited 7 East, 481.

(d) *Mondel v. Steel*, 10 L. J. Ex. 426; 8 M. & W. 858.

“ a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage might have been recovered; and this course was simple and consistent. But after the case of *Basten v. Butter* (a), a different practice, which had been partially adopted before in the case of *King v. Boston* (b), began to prevail, and being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to show that the chattel, by reason of the non-compliance with the warranty in the one case, and the work, in consequence of the non-performance of the contract in the other, were diminished in value. It must be considered, that in all these cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established, and it is competent for the defendant, in all of those, not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of the price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more.”

If the contract was not a sale of an ear-marked chattel, and was an executory one so that the property in the goods did not pass at the time of the contract, then the buyer may refuse to accept them when tendered, if they are not such as

(a) *Basten v. Butter*, 7 East, 479.

(b) *King v. Boston*, 7 East, 481, n.

the seller warranted they should be. If he accepts them, then, as before, he cannot return them, but has his remedy in an action for damages. It may become a question whether the buyer has accepted the goods, and in cases of sale by sample there is no acceptance until the buyer has inspected the bulk and found it to correspond with the sample; and if, through the acts of the seller, the inspection is an illusory one, the buyer may treat it as no inspection at all, as in the case of *Heilbutt v. Hickson* (a).

The buyer may decline to accept or pay for the goods when tendered, if there is any condition precedent to his obligation to do so which has not been performed. Many examples of this will be found in the chapter on Conditions Precedent.

There are two dicta in *Shipton v. Casson* (b) and in *Oxendale v. Wetherell* (c), that where a seller fails to deliver the whole quantity contracted for, the buyer may return the part received as soon as the time for delivering is past; but it seems more than doubtful, on principle, whether he could do so if the property had passed to him, in the absence of some agreement, express or implied. The principle laid down in these two cases was affirmed in *Colonial Insurance Co. v. Adelaide Insurance Co.* (d), in 1886, and is embodied in section 30 (1) of the Sale of Goods Act, which provides that "where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them," with the additional proviso that "if the buyer accepts the goods so delivered he must pay for them at the contract rate."

It is now well settled that in the sale of goods, specific at the time of the sale, that is ear-marked or identified as the subject-matter of the sale, the buyer cannot put the breach of a warranty on the same footing as an unperformed condition precedent. He cannot decline to accept ear-marked goods, on the ground that they are not as good as those contracted for.

(a) *Heilbutt v. Hickson*, 41 L. J. C. P. 228; L. R. 7 C. P. 438.

(b) *Shipton v. Casson*, 5 B. & C. 378, in 1826.

(c) *Oxendale v. Wetherell*, 9 B. & C. 386, in 1829.

(d) *Colonial Insurance Co. v. Adelaide Insurance Co.*, 56 L. J. P. C. 19; 12 App. Ca. 128.

Where the goods are ear-marked at the time of the contract, the stipulation as to quality is not a condition precedent uncomplished with, and as such entitling the buyer to reject the goods, but a warranty merely, for the breach of which the buyer may obtain damages. Although, as will be afterwards seen, the law is otherwise in cases where the goods were not specific or ear-marked at the time of the contract. The following extract is from Smith's *Leading Cases* (a), and states the learned authors' view of the law on the subject with great clearness. "A warranty, properly so called, can only exist "where the subject-matter of the sale is ascertained and existing, so as to be capable of being inspected at the time of the "contract, and is a collateral engagement that the specific "thing so sold possesses certain qualities, but the property "passing by the contract of sale, a breach of the warranty "cannot entitle the vendee to rescind the contract and revert "the property in the vendor without his consent. . . . But "where the subject-matter of the sale is not in existence, or "not ascertained at the time of the contract, an engagement "that it shall, when existing or ascertained, possess certain "qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the "vendee under the contract, because the existence of those "qualities being part of the description of the thing sold "becomes essential to its identity, and the vendee cannot be "obliged to receive and pay for a thing different from that "for which he contracted."

The case of *Heyworth v. Hutchinson* (b), in 1867, is a very instructive one on this point. The defendant bought 413 bales of wool, to arrive ex *Stige*, at 10¼*d.* a pound. "The "wool to be guaranteed about similar to samples, and if any "dispute arises it shall be decided by the selling broker, whose "decision shall be final." When the wool arrived at Liverpool, 180 bales turned out to be worth 2*d.* a pound less than the sample, 201 bales 1¼*d.* a pound less, and 32 bales ½*d.* a pound.

(a) *Smith's Leading Cases*, 11th ed., II., p. 28.

(b) *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447.

The brokers decided that the defendant should take the bales at the reduced prices. The defendants contended that they might decline to accept the wool, as not being about similar to sample. The Court, consisting of Cockburn, C. J., Blackburn, Shée, and Lush, JJ., held that this was a sale of specific wool, with a warranty that the quality was similar to sample, and that the defendants could not reject it, but might bring a cross-action on the warranty, or give the inferiority in evidence in reduction of damages. Blackburn, J., said: "The wools are guaranteed about similar to samples. Now, "such a clause may be a simple guarantee or warranty, or it "may be a condition. Generally speaking, when the contract "is as to any goods, such a clause is a condition going to the "essence of the contract; but when the contract is as to "specific goods, the clause is only collateral to the contract, "and is the subject of a cross-action, or matter in reduction "of damages, according to the case of *Mondel v. Steel* (a). "Here there is, I think, merely a warranty, as distinguished "from a condition."

And in the subsequent case of *Azemar v. Casella* (b), Lord Blackburn said of *Heyworth v. Hutchinson* (c), that the wool which arrived was of the same kind or character, but inferior only in quality. It is somewhat difficult to reconcile the two cases of *Toulmin v. Hedley* (d) and *Heyworth v. Hutchinson* (c), but possibly in the latter case the stipulation that the brokers should decide disputes may have had some weight. In Benjamin on Sale (e) it is suggested that "the dicta of the "learned Judges in *Heyworth v. Hutchinson* (c) must be taken "as referring to cases of *bargain and sale*, not to executory "contracts; and that the true theory is that every stipulation "as to quality, even in the case of specific goods, is, while the "contract is and remains an agreement to sell, a condition "justifying non-acceptance of the goods if the condition be

(a) *Mondel v. Steel*, 10 L. J. Ex. 426; 8 M. & W. 858.

(b) *Azemar v. Casella*, 36 L. J. C. P. 124 and 263; L. R. 2 C. P. 341 and 677.

(c) *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447.

(d) *Toulmin v. Hedley*, ante, p. 219; 2 C. & K. 157.

(e) 5th ed., p. 998.

“ unfulfilled, unless there be something in the terms of the
“ agreement to show that the buyer had consented to take the
“ goods at a reduced price if they turned out to be inferior
“ to the quality warranted.”

If the buyer has the right to refuse to accept the goods, as where there is some condition precedent not complied with, or the ordinary case of goods delivered on sale or return (a), he must do so in a reasonable time and unequivocally, and he must return them in the same condition as that in which he purchased them. If after a reasonable trial he finds the goods are not up to sample, or not what he approves of, he may tell the seller so, who must take the goods away, and they remain at the seller's risk until he does so (b); and it is provided by section 35 of the Sale of Goods Act that “The buyer is
“ deemed to have accepted the goods when he intimates to
“ the seller that he has accepted them, or when the goods
“ have been delivered to him, and he does any act in relation
“ to them which is inconsistent with the ownership of the
“ seller, or when after the lapse of a reasonable time, he
“ retains the goods without intimating to the seller that he
“ has rejected them.”

In *Chapman v. Morton* (c), in 1843, the plaintiffs in Dieppe agreed to sell to the defendant at Wisbech, a quantity of oil cake: the defendant accepted bills for the cake before its arrival at Wisbech in December. On its arrival he complained to the plaintiffs that it was not up to sample, and subsequently, on the 24th of January, wrote to them that it was lying at the public granary at their risk, and requesting them to take it back, which the plaintiffs declined to do. In May, the defendant again wrote, saying he would sell the cake, and apply the proceeds in part satisfaction of the damages; and in July advertised it for sale in his own name, and sold it. The Court held that the defendant

(a) *Moss v. Sweet*, in 1851, 20 L. J. Q. B. 167; 16 Q. B. 493; *Parker v. Palmer*, 4 B. & Ald. 387; *Richardson v. Dunn*, 2 Q. B. 218.

(b) *Okell v. Smith*, in 1815, 1 Stark. 107; *Cooke v. Riddellieu*, in 1844, 1 Car. & Kir. 561.

(c) *Chapman v. Morton*, 12 L. J. Ex. 292; 11 M. & W. 534.

had accepted the cake, and Lord Abinger, C. B., said : “ We must judge of men’s intentions by their acts, and not by expressions in letters, which are contrary to their acts. If the defendant intended to renounce the contract, he ought to have given the plaintiffs distinct notice at once that he repudiated the goods, and that on such a day he should sell them by such a person, for the benefit of the plaintiffs. The plaintiffs could then have called upon the auctioneer for the proceeds of the sale. Instead of taking this course, the defendant has exposed himself to the imputation of playing fast and loose : declaring in his letters that he will not accept the goods, but at the same time preventing the plaintiffs from dealing with them as theirs.”

In *Harnor v. Groves* (a), in 1855, the plaintiff agreed to buy twenty-five sacks of flour from the defendant, for which he paid. After using half a sack, he complained that the flour was not as good as he contracted for ; he then used two more sacks, and sold another. The Court held that he had dealt with the flour in such a manner as to preclude him from returning it.

In *Lucy v. Mouflet* (b), in 1860, the action was brought to recover the price of a hogshead of cider, purchased by the defendant, an innkeeper, from the plaintiff. On the 28th of May, the defendant had written to the plaintiff, saying that he had tapped the cider and found it inferior to the sample, and that if his customers continued to complain, he should be obliged to return it. To this the plaintiff returned no answer, and the defendant again complained by letter on the 21st of June, and on the 24th of June, wrote to the plaintiff to take it away. At that time about twenty gallons had been consumed, and the Court held that the plaintiff’s omission to answer the letter amounted, under the circumstances, to an acquiescence in the defendant’s endeavour to make a further trial of the cider.

The case of *Couston v. Chapman* (c), in 1872, arose out of a

(a) *Harnor v. Groves*, 24 L. J. C. P. 53 ; 15 C. B. 667.

(b) *Lucy v. Mouflet*, 29 L. J. Ex. 118 ; 5 H. & N. 229.

(c) *Couston v. Chapman*, L. R. 2 Sc. App. 250.

purchase of wine at an auction. The buyer, who complained that it was not up to sample, kept it for a greater time than the Court considered reasonable, and he was held liable to pay for it.

Section 36 of the Sale of Goods Act provides that:—
“ Unless otherwise agreed, where goods are delivered to the
“ buyer, and he refuses to accept them, having the right so
“ to do, he is not bound to return them to the seller, but
“ it is sufficient if he intimates to the seller that he refuses
“ to accept them.”

In *Grimoldby v. Wells* (a), in 1875, the plaintiff sold four quarters of tares to the defendant by sample. They were sent to the defendant, part of way in the plaintiff's cart and the remainder in the defendant's cart. The defendant examined them at once in his barn, and finding they were not up to sample, stated that he would not keep them, and that the plaintiff might do what he liked with them.

The plaintiff brought this action to recover the price, contending that if the defendant did not mean to accept the goods, he was bound to return them. But the Court held that this view was incorrect. Brett, J., said: “ I think that when
“ there is a sale by sample, and the time for inspection is
“ subsequent to delivery, and the place of inspection different
“ from that of delivery, then if the goods are found on such
“ inspection not to be equal to sample, the purchaser has a
“ right to reject them then and there, and it is the duty of
“ the vendor to get them back thence.”

Head v. Tattersall (b), in 1871, is an authority, that although the general rule is that the buyer's right to return the goods is gone if he is unable to return them in the same condition in which they were delivered to him, that rule is subject to the qualification that his right is not affected by any of those incidents which may befall the goods either from their nature, or in the course of the exercise by him of those rights over them which the contract gave. A horse was

(a) *Grimoldby v. Wells*, 44 L. J. C. P. 203; L. R. 10 C. P. 391.

(b) *Head v. Tattersall*, 41 L. J. Ex. 4; L. R. 7 Ex. 7.

purchased on Monday, and a condition of the sale was that the horse might be returned on the following Wednesday if it did not correspond with the warranty. On the way home, and without any negligence on the part of the plaintiff, the horse hurt itself seriously against the splinter-bar of a carriage, and the plaintiff returned it before Wednesday evening. The Court, consisting of Kelly, C. B., Bramwell, and Cleasby, BB., held that he had the right to return it, notwithstanding its damaged state, and to recover the price paid.

Elphick v. Barnes (a), in 1880, was a case resembling the preceding one. A horse was sold to the defendant on condition that he should try him for eight days, and be at liberty to return him at the end of that time if he did not suit. The horse died on the third day, and it was held that the plaintiff could not maintain an action for the price. In *Ray v. Barker (b)*, the return was prevented by the act of a third party, and although there was no decision on the point, the opinion of the Court seems to have been that it was no excuse.

Several of those cases which decide that one party is not bound to receive the goods when tendered, are also authorities for the converse,—viz., that where he would not be bound to receive any particular goods if tendered, there he cannot compel the other party to deliver them. If one party is not bound to receive, the other party cannot, in the absence of an agreement to that effect, be compelled to deliver.

Thus, in the case of *Lovatt v. Hamilton (c)*, in 1839, the buyer brought an action against the seller for not delivering. The sale was of fifty tons of palm oil “to arrive per *Mansfield*.” Only seven tons arrived. And the Court held that the contract for the fifty tons was entire, and that the plaintiffs were not entitled to the seven tons which did arrive.

And in *Vernede v. Weber (d)*, in 1856, the contract was to

(a) *Elphick v. Barnes*, 49 L. J. C. P. 698; 5 C. P. D. 321.

(b) *Ray v. Barker*, 48 L. J. Ex. 569; 4 Ex. D. 282.

(c) *Lovatt v. Hamilton*, 5 M. & W. 639, *ante*, p. 253.

(d) *Vernede v. Weber*, 25 L. J. Ex. 326; 1 H. & N. 311, *ante*, p. 528.

deliver a cargo of 400 tons of Aracan Necrensie rice more or less, which cargo by agreement might partly consist of Larong rice, but not to a greater extent than fifty tons. The cargo was found to consist of 285 tons of Larong and 159 tons of Latourie. And the Court held that the plaintiffs were not entitled to have any of the rice delivered to them. "We think," said Alderson, B., delivering judgment for himself and Martin, B., "it would have been impossible for the defendant to have insisted upon the plaintiffs accepting a cargo consisting only of a minute portion of Aracan Necrensie rice; for unless the cargo was what would substantially satisfy the description of a cargo of Aracan Necrensie rice, we think that the plaintiffs could not have been bound to accept it. . . . And if the plaintiff would not have been bound to accept the cargo brought, the defendant was not obliged to deliver it, for the contract must be mutual and reciprocal."

The liability of the buyer for neglecting or refusing delivery of goods is dealt with by section 37 of the Sale of Goods Act, which provides that: "When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take the delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract" (a).

(a) Cf. *Mersey Steel Co. v. Naylor* (1884), 53 L. J. Q. B. 497; 9 App. Ca. 434; *Braithwaite v. Foreign Hardware Co.*, [1905] 2 K. B. 545.



Right of resale. The question as to the right of an unpaid vendor to resell the goods has given rise to some very confusing dicta and decisions. It arose in *Heffernan v. Berry*, 32 U. C. Q. B. 518, the head-note to which is to the effect that the defendant had negotiated with the plaintiff for the purchase of a pair of horses and harness from the defendant for \$400, of which he had paid \$154 in cash. After some correspondence as to the time and mode of paying the balance, the defendant sold the property, whereupon the plaintiff brought an action for and recovered sum paid, on the ground that it was not clear that any agreement had been arrived at as to the terms and time of payment. The question is discussed as to the rights of the parties, assuming that there had been an agreement for the purchase and sale of the property. The discussion will be found at p. 520 of the report.

Right after resale to resort to purchaser for deficiency. Difference between sale of goods and executory agreement in this respect. In *Sawyer v. Pringle*, 20 O. R. 111, 18 O. A. R. 218, a machine was sold under an agreement that property was not to pass until the whole price was paid, that in default of payment as to any part of the price the whole should become due, and that the vendors should be at liberty to resume possession, nothing being said as to resale. The vendors seized the machine and resold it, crediting the purchasers with the proceeds, and brought action to recover the balance of the original price. Armour, C. J., held at the trial that the plaintiffs, by resuming possession and afterwards selling the machine, had disentitled themselves to sue, and he dismissed the action. Chancellor Boyd, on appeal to the Chancery Division, held that the plaintiffs were entitled to judgment, while Robertson, J., held that, by resuming possession, the plaintiffs had put an end to the contract of sale, and had no longer any right of action in respect to it. It will be observed that in the Court of Appeal, Hagarty, C. J., does not treat the case as the usual one of a sale of goods and the exercise by the unpaid vendor of the right or assumed right of resale. "This agreement cannot properly be called a contract of sale. It is an executory agreement for a future sale on performance of certain named conditions by the defend-

“ant.” After citing a number of American decisions, he said, “According to the spirit of these American decisions it would seem that in a contract like that before us, if the plaintiffs not only resume possession but sell or destroy the subject matter of the contract, they lose their remedy for the portion of the purchase money still unpaid, at all events that portion which is not in default, retaining in their hands the money already paid. It was certainly natural that when the defendant, the purchaser, found the plaintiffs selling the specified chattel, the subject of the contract for which he had given the notes, and thus debarring themselves from ever giving it to him, that he should consider his liability at an end.” Osler, J., also points out the difference between the present case and the greater number of English cases on resale, in that here the property always remained in the vendor, while in those cases the courts were dealing with property that had passed to the purchasers under the contract of sale, with or without a condition reserving a right of resale on default in payment of the price. “We are in danger of being misled by a false analogy if we compare this case to one in which there has been an actual sale, and then a resale by the unpaid vendor, who sells *qua pledgee*, as being the property of and as though they had been pawned to him by the vendee. The case, on the contrary, is one where there is an express contract which governs the rights of parties, and in which the plaintiffs have been careful to exclude the possibility of the goods being treated for any purpose as the goods of the defendant until the price shall have been paid.” MacLennan, J.A., held, dissenting, that the vendors became in effect mortgagees of the machine, and on default in payment were entitled forthwith to sell and then sue for the unpaid balance.

The decision in this case was followed in the subsequent case of *Arnold v. Playter*, 22 O.R. 608, in which the agreement, which was very similar to that in question in *Sawyer v. Pringle*, was treated as a conditional or executory contract for the sale of the machinery. Boyd, C., said, “Provision is made in the contract for resuming possession in case of default of payment (or otherwise), and for selling the ma-

“chinery. But it does not go further and provide that the
“purchase money is to be applied *pro tanto* on what is
“due, and that the purchasers are to remain liable for the
“difference. That, as I read *Sawyer v. Pringle*, is an
“essential provision without which no action for any part
“of the price can be maintained, if the vendors have taken
“possession of and sold the machinery.” As to the effect
of the express provision giving a right to sell, he proceeded
as follows: “This kind of contract is said by the Court of
“Appeal to mean: pay the price and get the machine (both
“possession and property); but till you pay, the machine
“is ours (the vendors’); it is our property; we can take
“possession and we have the right to sell because it is our
“property. The permission to sell, therefore, is imma-
“terial; it expresses the right in law which the vendor has
“by virtue of the property and the resumption of posses-
“sion; and it would seem not to add any ingredient which
“essentially differs from *Sawyer v. Pringle*. As was
“said by Mr. Justice Burton, the election to sell was an
“election to abandon the contract by the vendors; where-
“upon the vendees acquired a clear right to abandon it
“also; or rather, I suppose, to treat it as abandoned.”

In this case the vendors had obtained judgment on the notes given for the machinery before seizing and selling the property, and were seeking to prove a claim in the Master’s office for the balance due on the judgment, but it was held that the Master could go behind the judgment, and as the consideration for the judgment had disappeared by the intentional act of the Company in taking possession and selling, the claim should have been disallowed.

CHAPTER IV.

WHAT DAMAGES MAY BE RECOVERED WHERE THERE HAS BEEN A BREACH OF CONTRACT.

WHEN either party breaks the contract the other has a right to recover damages, but it does not follow that he can recover the whole of the loss he has suffered in consequence of that breach. The question is, what are the damages to the plaintiff caused by the defendant's breach which the law will allow the plaintiff to recover? The measure of the damages has been defined by the Sale of Goods Act as "the "estimated loss directly and naturally resulting, in the "ordinary course of events, from the . . . breach of contract" (a). The leading case on this subject is *Hadley v. Baxendale* (b), which although not a case of sale of goods, but of late delivery by a carrier, is a most important one in consequence of the Judges of the Exchequer Court having there laid down certain rules of general application to breaches of contract.

In *Hadley v. Baxendale* (b), in 1854, the plaintiffs were millers at Gloucester. On the 12th of May the engine shaft in their mill had to be removed in consequence of a fracture, and on the 13th the plaintiffs sent a servant to the defendants, who were carriers, to say that the mill was stopped, and that the shaft must be sent at once to Greenwich, to be used there as a pattern in making a new one. The defendants said that if the shaft was sent by 12 o'clock the next day it would be delivered at Greenwich on the following day. Accordingly, the shaft was delivered to the defendants before 12 o'clock on the 14th, but was not delivered by them at Greenwich

(a) Sale of Goods Act, ss. 50 (2) and 51 (2).

(b) *Hadley v. Baxendale*, 23 L. J. Ex. 179; 9 Exch. 341.

till several days later, and the consequence was that the new shaft was not delivered at the mill as soon as it otherwise would have been; the working of the mill was delayed and the profits on the working were lost, and other expenses incidental to the stoppage were incurred, for all of which the plaintiffs sought to hold the defendants liable, but failed. Alderson, B., in delivering the judgment of the Exchequer Court said: "Now we think the proper rule in such a case as the present is this:—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract, for, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the

“contract was made, were that the article to be carried was
“the broken shaft of a mill. But how do these circum-
“stances show reasonably that profits of the mill must be
“stopped by an unreasonable delay in the delivery of the
“broken shaft by the carrier to the third person? Suppose
“the plaintiffs had another shaft in their possession put up
“or putting up at the time, and that they only wished to
“send back the broken shaft to the engineer who made it;
“it is clear that this would be quite consistent with the
“above circumstances, and yet the unreasonable delay in the
“delivery would have no effect upon the intermediate profits
“of the mill.” And after pointing out that although in the
special circumstances of the case the loss did arise from the
defendants’ neglect, he proceeded, “these special circum-
“stances were here never communicated by the plaintiffs to
“the defendants. It follows, therefore, that the loss of
“profits here cannot reasonably be considered such a conse-
“quence of the breach of the contract as could have been fairly
“and reasonably contemplated by both parties when they
“made this contract. For such loss would neither have
“flowed naturally from the breach of this contract in the
“great multitude of such cases occurring under ordinary cir-
“cumstances; nor were the special circumstances, which,
“perhaps, would have made it a reasonable and natural
“consequence of such breach of contract, communicated to,
“or known by the defendants.”

This case has since been followed in cases too numerous to be referred to; and the reader is referred for fuller information on the subject to Mr. Mayne’s work on Damages.

In the case of *Gee v. The Lancashire and Yorkshire Railway Co. (a)*, in 1860, a very important remark was made by Bramwell, B., who, while delivering judgment, referred to the rule in *Hadley v. Baxendale (b)*, that damages to be recoverable must be such as the parties must be taken to

(a) *Gee v. Lancs. and Yorks. Ry. Co.*, 30 L. J. Ex. 11; 6 H. & N. 211.

(b) *Hadley v. Baxendale*, 23 L. J. Ex. 179; 9 Ex. 341.

have contemplated as the probable result of the breach, and said: "I am not sure that another qualification might not be "added which would be in favour of the plaintiff in this "case, viz., that in the course of the performance of the "contract, one party may give notice to the other of "any particular consequences which will result from the "breaking of the contract, and then have a right to say, " 'If after that notice, you persist in breaking the contract, " 'I shall claim the damages which will result from the " 'breach' " (a).

✓ In the case of a sale of goods, the seller's breach may consist in his having delivered to the buyer an article of less value than the article which should have been delivered, and there the difference in value is the measure of the damages; or the breach may have consisted in the failure to deliver any goods at all, and in this case instead of the damages being a difference in value as in the first one, they are what the buyer must pay to obtain the goods in the market, or if necessary from some other quarter. But by reason of having such an inferior article or nothing at all delivered to him, the buyer may suffer much greater damages than the difference in value, or the full value, and then the question becomes, are those greater damages such as the parties at the date of the contract must be taken to have contemplated as the probable result of the breach? Or the seller's breach may consist in the unpunctual delivery of the goods.

On the other hand, the buyer may have been the party to break the contract, as by refusing to accept the goods when tendered. Here the seller may by reselling the goods put himself in a position in which the buyer had contracted to put him, and charge the buyer with costs reasonably incurred in doing so; but he may be unable to resell them, and he may then give evidence of any loss he has suffered; and if that loss is such as the parties must be taken to have contemplated, he may recover it.

(a) See also *Simpson v. London and North Western Ry. Co.*, 1 Q. B. D. 274; and *Horne v. Midland Ry. Co.*, L. R. 7 C. P. 583.

From these considerations it appears that the value of the thing contracted to be delivered, and of that which was delivered, on the day fixed for delivery, are important considerations. Now the best possible evidence of the value of a thing is what it did or would fetch in the market, or what must have been paid for it if it had been bought there; but if the thing has no market price, then some other evidence of value must be obtained. And the price at which the buyer either agreed to resell it in the ordinary course of business, or the price which by the contract he had agreed to pay for it, may then be the best evidence obtainable (a). But except where the price at which the buyer agreed to buy or to sell the goods is evidence of value, that price has nothing whatever to do with the damages of either party; the buyer is entitled to have in his hands, on the day fixed for delivery, goods which at that date have a certain value; the price which he may have contracted to pay may be more or less than they are worth on that day, but the value on that day is what the contract gives him, and therefore it is all that he can charge the seller with. For example, if the market price falls after the date of the contract, that is a loss which by the contract must fall on the buyer in any case and cannot be charged to the seller, even if the seller fails to perform his contract. If on the other hand the market price rises after the date of the contract, that is a gain to the buyer which the contract gives him, and which he loses by the seller's breach, and which the seller is liable to pay.

The rules as to damages for non-acceptance and non-delivery are contained in sections 50 (3) and 51 (3) of the Sale of Goods Act, the former providing that :

“Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was

(a) *Heilbutt v. Hickson*, 41 L. J. C. P. 228; L. R. 7 C. P. 455; considered in *Drummond v. Van Ingen* (1887), 56 L. J. Q. B. 563; 12 A. C. 284.

“fixed for acceptance, then at the time of the refusal to “accept.”

And the latter that :

“Where there is an available market for the goods in “question the measure of damages is *prima facie* to be ascer- “tained by the difference between the contract price and the “market or current price of the goods at the time or times “when they ought to have been delivered, or, if no time was “fixed, then at the time of the refusal to deliver.”

A loss of profits on a resale cannot be recovered as such. Where a buyer resells at a profit, but in consequence of the seller's breach is unable to deliver and so loses his profit, the reselling price is not an element in the calculation of damages except in those cases where the reselling price is taken as the best evidence of value.

If the goods are procurable in the market, the loss was, in fact, not due to the defendant's breach, but to the plaintiff not having bought in, and if it was not so due, then it clearly could not be recovered ; but where it is in fact the result of the defendant's breach, and the parties had the resale in contemplation, there seems no reason why it should not be recovered as such.

In *Cassaboglou v. Gibbs* (a), in 1882, a principal instructed his agent abroad to buy and consign to him opium of a certain quality. The agent sent over opium of an inferior quality, and the Court held that the damages were not the difference in value, as they would have been if it had been a case of seller and buyer, but merely the loss actually sustained.

Having now considered what the facts are which it is important to ascertain before the damages can be calculated, it will be desirable to examine the cases, taking firstly, those cases where the market has been referred to as the test of value ; secondly, those cases where there was no market to refer to, dividing the latter into two classes—one where

(a) *Cassaboglou v. Gibbs*, 51 L. J. Q. B. 593 ; 52 L. J. Q. B. 538 ; L. R. 9 Q. B. D. 220 ; 11 Q. B. D. 797.

the breach was as to quality, the other where the breach was as to time; and thirdly, certain exceptional cases.

The general rule is, that interest cannot be recovered, but the discussion of this subject is left until the authorities are examined in detail (a).

In *Leigh v. Paterson* (b), in 1818, the defendants contracted to sell tallow to the plaintiffs "in all next December." In October they said they had resold the tallow, and could not perform their contract. The plaintiffs did not acquiesce in the rescission of the contract, and recovered the difference between the contract and the market price on the 31st of December, the last day for delivery.

In *Startup v. Cortazzi* (c), in 1835, the defendant in June contracted to sell to the plaintiffs 2,100 quarters of Odessa linseed, at 30s. a quarter, to be shipped on board the plaintiffs' ship at Odessa in October. The plaintiffs sent their ship there, but she was not loaded, as the defendant had given notice that he would not fulfil his contract. The defendant had already received 1,575*l.* as half the price. If the linseed had been delivered at Odessa it would have arrived in February, when its value in the market would have been from 47*s.* to 48*s.* a quarter. At the time of the trial it was about 56*s.* The defendant paid into Court at the rate of about 47*s.* a quarter. The plaintiffs contended that they were entitled to higher damages: there was no evidence of any special damage, and the jury found a verdict for the defendant. Lord Abinger seems to have considered the measure of damages to have been the difference between the price at the time when the seed would have arrived here and the contract price. Alderson, B., thought the price at the time when the defendant gave notice he would not perform the contract was not the criterion, for at that time the plaintiffs had parted with their money and could not go into the market, and that the price

(a) *Post*, p. 575.

(b) *Leigh v. Paterson*, 2 Moo. 588. See also *Gainsford v. Carroll*, 2 B. & C. 624, in 1824.

(c) *Startup v. Cortazzi*, 2 Cr. Mee. & Ros. 165.

when it should have arrived if delivered according to contract was a better criterion. This case does not appear to be well reported.

By section 53 (3) of the Sale of Goods Act it is provided that "In the case of breach of warranty of quality such loss "is *prima facie* the difference between the value of the goods "at the time of delivery to the buyer and the value they would "have had if they had answered to the warranty" (a).

In *Loder v. Kekulé* (b), in 1857, the plaintiff had contracted to purchase from the defendant 200 casks of tallow, for which he paid at once; the unloading of the cargo began on the 16th of January and was finished on the 25th. The plaintiff, having inspected it, wrote to the defendant on the 28th, saying that 184 of the casks were not according to contract, and declined to accept them, and requested the defendant to return the purchase-money; a correspondence followed, and eventually the plaintiff resold the tallow on the 12th of March. The price of tallow had fallen, and the Court held that the measure of damages would have been the difference between the value of tallow of the quality contracted for and the value of that delivered at the time of the delivery, provided there could have been an immediate resale in the market, but that in this case the defendant had delayed the resale, and that as the jury had found the resale was within a reasonable time, the damages were the difference between the market value of the quality contracted for at the time of delivery and the price obtained on resale, and not the difference between the amount prepaid and price obtained on resale. In *Roth v. Taysen* (c), in 1896, Lord Esher, M. R., said: "When there is a repudiation which the other "party chooses to treat as a breach, the primary rule "is that the damages are the difference between the contract price and the market price of the goods at the

(a) See *Phillpotts v. Evans*, 5 M. & W. 474, and *Ashworth v. Wells*, 78 L. T. 136.

(b) *Loder v. Kekulé*, 27 L. J. C. P. 27; 3 C. B. N. S. 128.

(c) *Roth v. Taysen*, 1 Com. Cas. 306 at pp. 310, 311. See also *Nickoll v. Ashton*, 69 L. J. Q. B. 640; [1900] 2 Q. B. 298; and *Tredegar Iron and Coal Co. Ltd. v. Hawthorn*, 18 T. L. R. 716.

“date of the breach. If the repudiation takes place before the day of delivery, the other party has the right to bring an action immediately, and it follows that he has the right to have his damages assessed at the time he brings his action. In such a case the damages are not the difference between the contract and market price on the day the action is brought. It is the duty of the jury to assess them, having regard to, and making allowance for, the fact that the plaintiff is receiving damages before the date of delivery has arrived. There is this further rule. The party who has treated a repudiation as a breach is bound to do what is reasonable to prevent the damages from being inflamed or increased.”

In *Josling v. Irvine* (a), in 1861, the defendant sold 3,000 gallons of naphtha to the plaintiff, at 2s. 2d. a gallon, to be delivered in weekly instalments of 1,000 gallons; the day after the sale the plaintiff resold them to Hoile at 2s. 6d. a gallon. The defendant refused to deliver any of the naphtha. It was proved that at the time of the breach naphtha could not have been bought for less than 5s. 9d. a gallon. Held, that as the plaintiff would have no answer to an action by Hoile for the difference between 5s. 9d. and 2s. 6d., that was the amount the plaintiff was entitled to recover from the defendant. The amount that the plaintiff was entitled to recover as his damages was not his loss of profits, viz., the difference between 2s. 2d. and 2s. 6d., but his liability on his second contract, viz., the difference between 2s. 6d., the selling price, and 5s. 9d., the market price. Why the damages were not the difference between 2s. 2d. and 5s. 9d. does not appear.

In *Williams v. Reynolds* (b), in 1865, the plaintiff purchased from the defendants, on the 1st of April, 500 piculs of China cotton at 16 $\frac{3}{4}$ d. per lb., to be delivered in August, guaranteed fair. On the 25th of May the plaintiff made a contract to sell to a third party the same quantity and quality of cotton at 19 $\frac{3}{4}$ d. per lb., intending to deliver the same cotton which

(a) *Josling v. Irvine*, 30 L. J. Ex. 78; 6 H. & N. 512.

(b) *Williams v. Reynolds*, 6 B. & S. 495.

the defendants had contracted to deliver to them. At the end of August, the latest time for delivery under both contracts, the price of such cotton was $18\frac{1}{4}d.$ per lb. The Court of Queen's Bench held that the damages to which the plaintiff was entitled were the difference between $16\frac{3}{4}d.$ and $18\frac{1}{4}d.$, and were not affected by the advantageous subsale made by the plaintiff.

Jones v. Just (a), in 1868, was an action on a contract of sale of Manilla hemp "expected to arrive." When the hemp had been delivered it was found not to correspond to contract, and after some correspondence the plaintiff, the buyer, re-sold it by auction, when in consequence of the rise of prices in the market, it fetched a sum nearly equal to the invoice price. The jury were told that if there had been a breach of the seller's warranty, the damages would be the difference between what the hemp was worth when it arrived and the market value at that time of such hemp as should have been delivered, thus giving the plaintiff the benefit of the rise in the market; and this was held by Cockburn, C. J., Mellor and Blackburn, JJ., to have been a proper direction.

In *Ogle v. Earl Vane (b)*, in 1868, the defendant had contracted to deliver iron to the plaintiff in July, but owing to a breakdown in the furnaces, had been unable to do so. At the defendant's request the plaintiff had refrained from buying in against him until the following February, when he bought in at a considerable advance on the contract price, and the measure of damages was held to be the difference between the contract and the February prices (c).

Brown v. Muller (d), in 1872, is a leading case on the measure of damages where the contract was for the delivery of goods by instalments. Here the plaintiff bought of the defendant 500 tons of iron, to be delivered in about equal proportions in September, October, and November, 1871. In

(a) *Jones v. Just*, 37 L. J. Q. B. 89; L. R. 3 Q. B. 197.

(b) *Ogle v. Earl Vane*, 36 L. J. Q. B. 175; 37 L. J. Q. B. 771; L. R. 2 Q. B. 275; L. R. 3 Q. B. 272.

(c) See also *Hickman v. Haynes*, 44 L. J. C. P. 358; L. R. 10 C. P. 598.

(d) *Brown v. Muller*, 41 L. J. Ex. 214; L. R. 7 Ex. 319.

August the defendant gave notice that he did not intend to deliver any iron. In December the plaintiff commenced the action, and claimed as damages for non-delivery the difference between the contract and market prices on the 30th of November, which amounted to 237*l.* 10*s.* If the plaintiff had bought in at the time when the defendant repudiated the contract the difference would have been 25*l.* If he had bought in one-third of the iron at the end of each of the three months the sum of the differences would have amounted to 109*l.* 4*s.* The Court held that the last was the true measure of damages.

Tyers v. Rosedale and Ferryhill Iron Co. (a), in 1873, was an action for not delivering under the following circumstances. There were two contracts, each for the delivery of 1,000 tons of iron in monthly quantities over 1871. Early in 1871 the plaintiffs, the buyers, found it inconvenient to take the whole of the monthly instalments, and from time to time requested the defendants, the sellers, to postpone delivery, to which the sellers agreed, delivering only portions of the instalments. In September, however, the buyers began to press for deliveries, and on the 6th of December informed the sellers that the whole of the 2,000 tons must be delivered by the end of that month. The defendants offered to deliver the whole of the December instalment, but refused to deliver any more iron on the ground that the contract was at an end as to the other instalments. In all 907 tons had been delivered by the end of 1871, and the defendants paid into Court sufficient to cover the damages from the short delivery of the December instalment. Kelly, C. B., and Pigott, B., were of opinion that a verdict should be entered for the defendant; Martin, B., was of a contrary opinion, in which, on the appeal, Cockburn, C. J., Blackburn, Mellor, Lush, Brett, and Lindley, JJ., agreed: Cockburn, C. J., said: "It did not suit the purchasers to take the iron in the instalments originally contemplated by the parties, and they proposed to

(a) *Tyers v. Rosedale Co.*, 42 L. J. Ex. 185; 44 L. J. Ex. 130; L. R. 8 Ex. 305; L. R. 10 Ex. 195.

“the sellers to postpone from time to time the delivery of
“the monthly instalments. Now it would have been perfectly competent to the defendants to say, ‘We will not
“acquiesce in that proposal of yours. You are bound to
“take the iron month by month, and you must so take it,
“or consider the contract at an end.’ Instead of doing that
“the defendants, as I read the letters, acquiesced, not in
“holding the contract at an end, but in postponing the period
“of delivery. The iron was to be delivered in the course of
“the year 1871, and there was, by reason of this postponement, a very considerable arrear at the end of this year.
“Then the plaintiffs call on the defendants to deliver at once
“the whole of what remained undelivered. I think that this
“was a demand which they were not entitled to make. I
“think that the postponement had the effect of carrying the
“period of delivery over the year 1872, but that the defendants could not be called upon to deliver 1,000 tons of iron
“at one time, but only in such quantities as were originally
“provided for. Therefore the defendants might have said,
“‘We shall not deliver the whole that remains in one mass,
“but we will deliver it according to the terms of the contract.’ But they did not say this. What they said was,
“‘We will not deliver you anything at all.’ There I think
“they were wrong. Consequently, there was a breach of the
“contract, for which the defendants are liable in damages.”
Blackburn, J., said, if the defendants had said, “‘We want
“‘a reasonable time and no more,’ I should have been willing
“to construe the agreement in that way. But they did not
“ask for time; they refused to deliver anything but the
“monthly quantity.”

In *Ex parte Llansamlet Tin Plate Co. (a)*, in 1873, one Voss had in May contracted to sell to the Llansamlet Co. 300 tons of iron to be delivered at the rate of 40 tons a month. In some months no iron was delivered and in others not the full amount. The Llansamlet Co. in some cases made purchases to supply the deficiencies, but in January when

(a) *Ex p. Llansamlet Tin Plate Co.*, 16 Eq. 155.

Voss filed a liquidation petition, there remained undelivered 224 tons. The price had risen, and the company claimed to prove for the difference between the contract and market prices of 224 tons at the date of filing the petition. There was no evidence that the deliveries had been postponed at the request of Voss so as to bring the case within *Ogle v. Earl Vane*(a), and Bacon, V.-C., held, and was affirmed in the Court of Appeal, that the damages were to be calculated as the difference between the market and contract prices of the undelivered amounts at the successive contract dates for delivery, and that where the company had bought in, the damages were the difference between the contract price and the price at which they bought in.

Roper v. Johnson (b), in 1873, was another case of refusal to deliver; there was a contract for the delivery of 3,000 tons of coal "to be taken during the months of May, June, July, and August." The buyers failed to send for any coals in May, and on the 31st of May the seller declined to go on with the contract. This action was commenced by the buyers on the 3rd of July to recover damages for non-delivery, and the trial took place in August. The defendant argued that the damages were to be estimated by inquiring upon what terms the plaintiffs could have gone into the market and obtained a similar contract on the day when they elected to treat the contract as at an end, and that it was for the plaintiffs to give evidence of loss so ascertained. But on the motion the Court was of opinion that if the plaintiff had waited until the end of August the case must have followed *Brown v. Muller* (c).

But said Brett, L. J., "To entitle a plaintiff to recover damages in an action upon a contract, he must show a breach, and that he has sustained damage by reason of that breach. . . . The general rule as to damages for a breach of a contract is, that the plaintiff is to be compensated

(a) *Ogle v. Earl Vane*, 36 L. J. Q. B. 175; 37 L. J. Q. B. 771; L. R. 2 Q. B. 275; L. R. 3 Q. B. 272.

(b) *Roper v. Johnson*, 42 L. J. C. P. 65; L. R. 8 C. P. 167.

(c) *Brown v. Muller*, 41 L. J. Ex. 214; L. R. 7 Ex. 319, *ante*, p. 558.

“for the difference of his position from what it would
“have been if the contract had been performed. . . . Now,
“although the plaintiff may treat the refusal of the defendant
“to accept or to deliver the goods, before the day for per-
“formance as a breach, it by no means follows that the
“damages are to be the difference between the contract price
“and the market price on the day of the breach. . . . The
“election to take advantage of the repudiation of the contract
“goes only to the question of breach, and not to the question
“of damages; and when you come to estimate the damages,
“it must be by the difference between the contract price and
“the market price at the day or days appointed for perform-
“ance, and not at the time of breach. . . . It seems to me
“to follow . . . that the plaintiffs here did all they were
“bound to do when they proved what was the difference
“between the contract price and the market price at the
“several days specified for the performance of the contract,
“and that *prima facie* that is the proper measure of damages;
“leaving it to the defendant to show circumstances which
“would entitle him to a mitigation. No such circumstances
“appeared here: there was nothing to show that the plain-
“tiffs ought to have or could have gone into the market,—a
“rising market,—and obtained a similar contract.”

In the following cases there was no market to refer to as a test of value. They are for convenience taken in the order, first where there was a breach as to quality, and secondly as to time.

In *Lewis v. Peake* (a), 1816, a buyer of a horse with a warranty, resold it with the same warranty and was sued by his purchaser for breach of the warranty. It was held he could recover the cost of defending that action, from his seller.

In *Chesterman v. Lamb* (b), in 1834, the buyer of a horse warranted sound recovered from the seller the cost of the horse's keep at livery where he had sent it to stand, on discovering its unsoundness, until it could be sold.

(a) *Lewis v. Peake*, 7 Taunt. 153.

(b) *Chesterman v. Lamb*, 2 Ad. & El. 129; *McKenzie v. Hancock*, Ry. & M. 436.

In *Ellis v. Chinnock* (a), in 1835, Coleridge, J., said: "If a person has bought the horse with a warranty, which has been broken, and he tenders the horse to the seller, and the seller refuses to receive it back, the buyer is entitled to keep it a reasonable time till he can sell it, and for that time he may against the seller recover the expense of keeping it." (b).

Section 53 (4) provides that:—

"The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage."

In *Mondel v. Steel* (c), in 1841, the defendant had contracted to build a ship for the plaintiff according to specification, and in a former action in which he had sued the plaintiff for the price of the ship, the plaintiff had successfully pleaded that he was entitled to a reduction of the price by reason that the ship had not been built according to the specification, and the defendant had obtained a verdict for the contract price of the ship, less the amount the plaintiff was entitled to deduct. The plaintiff now sued the defendant for special damages for breach of the defendant's contract to build the ship according to the contract; by reason of her not being so built she had become much strained and had to be repaired, and the plaintiff lost the use of her during the time she was being repaired. The defendant pleaded the former verdict, but the Court held the plea bad, and Parke, B., delivering the judgment of the Court, said: "All the plaintiff could by law be allowed in diminution of damages, on the former trial, was a deduction from the agreed price, according to the difference, at the time of the delivery, between the ship as she was, and what she ought to have been according to the contract; but all claim for damages beyond that, on account of the subsequent necessity for more extensive repairs, could not have

(a) *Ellis v. Chinnock*, 7 C. & P. 169.

(b) See also *Clare v. Maynard*, 6 Ad. & El. 519; *Cor v. Walker*, 6 Ad. & El. 523.

(c) *Mondel v. Steel*, 10 L. J. Ex. 426; 8 M. & W. 858.

“been allowed in the former action, and may now be “recovered” (a).

In *Dingle v. Hare* (b), in 1859, the plaintiff had purchased from the defendant 20 tons of manure warranted to contain a certain proportion of phosphorus at 5*l.* 5*s.* a ton. The plaintiff resold 10 tons to farmers which turned out bad, making a profit of 30*s.* a ton. Two of these 10 tons he had sold to one Robins, who found them of little value, and the plaintiff paid him 20*l.* as damages. The buyers of the other eight tons had made no complaints.

Byles, J., in his summing up said : “If the defendant knew “that the plaintiff was a merchant dealing in these articles “and buying for the purpose of selling them again, any loss “he might sustain upon such resale, by reason of their bad “quality or of a breach of warranty, might fairly be said to “be a damage which was in the contemplation of the parties “at the time of making the contract ; that, if they (the jury) “thought the settlement of Robins’ claim was a fair and “reasonable thing, the defendant was bound to make good “the loss ; and that as to the eight tons as to which the “purchasers had made no complaint and possibly might never “make any, the plaintiff was yet entitled to claim compensation, and to recover reasonable damages in respect of their “not being of a fair merchantable quality and according to “the warranty.”

In *Mullett v. Mason* (c), in 1866, a cattle dealer sold a cow to the plaintiff, fraudulently warranting it free from infectious disease knowing it to be diseased. The plaintiff placed the cow with five others, which caught the disease and died, and it was held that the plaintiff could recover as damages the value of all the cows.

Section 53 (2) of the Sale of Goods Act provides that :—

“The measure of damages for breach of warranty is the “estimated loss directly and naturally resulting in the ordinary “course of events from the breach of warranty.”

(a) See also *Rigge v. Burbidge*, in 1846, 15 L. J. Ex. 309 ; 15 M. & W. 598.

(b) *Dingle v. Hare*, 29 L. J. C. P. 143 ; 7 C. B. N. S. 145.

(c) *Mullett v. Mason*, 35 L. J. C. P. 299 ; L. R. 1 C. P. 559.

In *Randall v. Raper* (*a*), in 1858, the defendant sold barley to the plaintiff, warranting the quality : the plaintiff resold it with the same warranty to persons who sowed it, and had consequently suffered loss through inferior crops to the extent of 261*l.* 7*s.* 6*d.* They then claimed compensation from him, but no sum had been agreed upon, and no payment made. The plaintiff obtained a verdict for 261*l.*, which was upheld by Lord Campbell, C. J., Wightman, Erle, and Crompton, JJ., on the ground that in assessing the damages the jury ought to include the amount to which they considered the plaintiff had become liable to his buyers.

In *Smith v. Green* (*b*), in 1875, the defendant sold a cow to a farmer, warranting her to be free from foot-and-mouth disease. The plaintiff, in the ordinary course of his business, placed her among other cows, some of which caught the disease from the cow in question and died. The jury found that there had not been any false representation. On the motion for a new trial the Court, consisting of Lord Coleridge, C. J., Brett and Grove, JJ., held that the jury, in estimating the damages, might take into account the fact that the seller knew, or must be taken to have known, that the cow would be placed with other cows, and if so then the loss of the other cows might naturally be expected to happen (*c*).

In *Randall v. Newson* (*d*), in 1877, the defendant supplied the plaintiff with a pole for his carriage, which broke in consequence of the horses swerving ; the horses and carriage were damaged to the extent of 130*l.* The price of a new pole was 3*l.*, and the question was whether the defendant's liability was limited to the 3*l.* At the trial, before Archibald, J., the jury found that the pole was not reasonably fit and proper for the carriage, and that the defendant had not been guilty of any negligence, and on these findings a verdict

(*a*) *Randall v. Raper*, 27 L. J. Q. B. 266 ; E. B. & E. 84.

(*b*) *Smith v. Green*, L. R. 1 C. P. D. 92 ; 45 L. J. C. P. 28.

(*c*) This direction was approved of subsequently in *Randall v. Newson*, in the Queen's Bench, 2 Q. B. D. 111. See also *Mullett v. Mason*, 35 L. J. C. P. 299 ; L. R. 1 C. P. 559.

(*d*) *Randall v. Newson*, 45 L. J. Q. B. 364 ; 46 L. J. Q. B. 257 ; 2 Q. B. D. 102.

for the plaintiff for 3*l.* was entered with leave to the defendant to move. On the motion before Blackburn and Lush, JJ., judgment was ordered to be entered for the defendant on the ground that the defect was a latent one, which neither care nor skill could discover. The plaintiff appealed, and the judgment of the Queen's Bench was reversed in the Court of Appeal, consisting of Kelly, C. B., Mellish, L. J., Brett and Amphlett, JJ. A. It was held that the question, which should have been left to the jury, was whether the injury to the horses was or was not a natural consequence of the defect in the pole. The Court held that the damages suffered by the breach were the loss of the pole itself and the damages which were the natural consequence of the pole breaking.

In *Hammond v. Bussey* (a), in 1887, the defendant contracted to sell coal of a particular description to the plaintiffs, knowing the purpose for which it was required, viz., reselling it as coal of the same description. The coal did not answer such description, which fact only became apparent upon its use by the sub-buyers. The latter brought an action against the plaintiffs for breach of contract, of which notice was given to the defendant, who repudiated liability. In an action brought by the plaintiffs, claiming from the defendant the damages recovered from them in the action by the sub-buyers and the costs thereby incurred, it was held that the plaintiffs were entitled to recover as damages which might reasonably have been supposed to have been in the contemplation of the parties at the time when they made the contract, as the probable result of a breach of it.

In *Thol v. Henderson* (b), in 1881, the defendants, who sold the goods to the plaintiff, paid into Court an amount which it was admitted was sufficient, provided the plaintiff could not recover in respect of his loss of profit on the sub-sale. Grove, J., held that he was not entitled to do so (c).

In the following cases there was a breach as to time, and there was no market price to refer to. When the contract

(a) *Hammond v. Bussey*, 57 L. J. Q. B. 58; 20 Q. B. D. 79.

(b) *Thol v. Henderson*, 8 Q. B. D. 457.

(c) See also *Heilbutt v. Hickson*, 41 L. J. C. P. 228; L. R. 7 C. P. 455.

is to deliver goods at a certain date and that date is passed, the buyer may accept the goods and bring his action for any damages he may have actually suffered in consequence of the late delivery. He does not, by accepting a late delivery, waive any claim he may have for damages arising from the delay. Just as where, by accepting goods which were not up to the warranted quality, he does not waive his right to damages for breach of warranty.

In *Fletcher v. Tayleur* (a), in 1855, where the action was to recover damages for the loss of profits by reason of the late delivery of a ship, Willes, J., suggested that the measure of damages might be the average profit made by the use of it.

In *Portman v. Middleton* (b), in 1858, the plaintiff had contracted to repair a threshing engine for one Sheaf by the beginning of August. He then sub-contracted with the defendant to make a new fire-box for the engine, and paid the defendant 12*l.* in advance, but said nothing about his contract with Sheaf. In consequence of the defendant's delay the plaintiff was obliged to purchase a fire-box from another person, and was unable to deliver the engine to Sheaf until November. Having settled Sheaf's claim for 20*l.* the plaintiff now sought to recover this sum and a sum of 8*l.* for extra expenses incurred, together with the sum of 12*l.* paid in advance. There was no question as to the two latter sums, but the Court held that he was not entitled to recover the 20*l.*, as such damages did not come within the rule in *Hadley v. Baxendale* (c), either as the ordinary result of the breach, or contemplated as the probable result in the special circumstances known.

Smeed v. Foord (d), in 1859, was an action by a farmer for damages for late delivery of a threshing machine, which the defendant had contracted to deliver within three weeks. The defendant knew that it was the plaintiff's custom to thresh the corn in the field and send it direct to the market.

(a) *Fletcher v. Tayleur*, 25 L. J. C. P. 65; 17 C. B. 21.

(b) *Portman v. Middleton*, 27 L. J. C. P. 231; 4 C. B. N. S. 322.

(c) *Hadley v. Baxendale*, 23 L. J. Ex. 179; 9 Ex. 341, *ante*, p. 548.

(d) *Smeed v. Foord*, 28 L. J. Q. B. 178; 1 E. & E. 602.

As it was not delivered in time, the plaintiff tried to hire a machine and, being unsuccessful, was compelled to carry the corn home and stack it, and while so stacked it was damaged by rain, and had to be kiln-dried after threshing, and when sold it brought a less price than it would have done had it been sold at the time it would have been if the machine had been punctually delivered. The market price also had gone down. It was held that the plaintiff was entitled to substantial damages in respect of the expense of stacking the corn, the deterioration and expense of drying, but not of the fall of the market.

Brady v. Oastler (a), in 1864, is an authority to show that the motives which induced the plaintiff to enter into a contract have no bearing on the question of damages. The defendant delivered certain knapsack-straps late, and paid into Court a sum sufficient to cover any expense which the plaintiff had been put to in completing the contract. The goods had all been paid for at the rate of 3s. 9d. a set, and for the purpose of enhancing the damages, the plaintiff tendered evidence to show that 11d. out of the 3s. 9d. had been paid in consideration of the defendant's promise to supply the goods within the short times mentioned in the contract. The evidence was held by Pollock, C. B., Bramwell and Channell, BB., to have been properly rejected, Martin, B., dissenting.

In the case of *Borries v. Hutchinson* (b), in 1865, the defendant contracted to deliver 75 tons of caustic soda to the plaintiffs for shipment from Hull for the Continent, in equal quantities, in June, July, and August. The plaintiffs had made a contract with one Heitmann to supply him at St. Petersburg with the above quantities of soda, to be shipped to him at the above times. The defendant delivered 26 tons in September, and in consequence of the lateness of the season the rates for freight and insurance to St. Petersburg were higher than at the end of August. It was admitted that caustic soda was not kept in stock so as to be purchasable at any time in the market and therefore had

(a) *Brady v. Oastler*, 33 L. J. Ex. 300; 3 H. & C. 112.

(b) *Borries v. Hutchinson*, 34 L. J. C. P. 169; 18 C. B. N. S. 445.

no market value. Heitmann had resold the soda to one Heinburger. The plaintiffs claimed, as damages, the increased freight and charges, the loss of their profits on resale of the undelivered portion, and a sum of 159*l.*, made up partly of the profit which Heitmann would have made by his subsale to Heinburger, and partly of a sum (which the plaintiffs had repaid Heitmann), paid by Heitmann to Heinburger by way of compensation for the non-delivery. It was held that the plaintiffs could recover the increased freight and insurance, and also the loss on their profits on the undelivered portion, but not the 159*l.* Erle, C. J., said : " Here, the vendor had notice that the vendee was buying " the caustic soda—an article not ordinarily procurable in " the market—for the purpose of resale to a sub-vendee on " the Continent. He made the contract, therefore, with " knowledge that the buyers were buying for the purpose of " fulfilling a contract which they had made with a merchant " abroad. If the plaintiffs could have delivered the caustic " soda, which the defendant failed to supply, to their vendee " Heitmann, their profit thereon would have been 52*l.* 5*s.* 4*d.* " That sum the defendant has paid into Court ; and we may " assume that the plaintiffs are entitled to recover as " damages for the defendant's breach the loss of the profit " which the plaintiffs would have derived from the trans- " action if the defendant had delivered the caustic soda " pursuant to his contract . . . The plaintiffs further " claimed damages by reason of their having been called " upon to reimburse Heitmann, their vendee, to the extent of " 159*l.*, which Heitmann had paid to Heinburger, a manu- " facturer to whom he had contracted to sell the soda, to " compensate him for the breach of his contract with him. " It appears to me that that claim is too remote. The " defendant had notice at the time of entering into the " contract with the plaintiffs that they had contracted with " one purchaser on the Continent. For the damages resulting " from that, it is agreed that he is responsible. But he had " no notice of the subsequent resale : and it is not to be " assumed that the parties contemplated that he was to be

“held responsible for the failure of any number of subsales. “These could not in any sense be considered as the direct, “natural, or necessary consequence of a breach of the “contract he was entering into.” Willes, J. said: “Here “the purchasers entered into a contract to sell to Heitmann, “trusting to the performance of his contract by the defendant, “to enable them to perform theirs. The defendant had “notice of this contract; and I see no injustice in holding “him to be liable to that extent. Heitmann chose to take “upon himself a similar risk, and to contract for the sale of “the soda to Heinburger. Even if the defendant had notice “of this second contract at the time he sold to Heitmann, I “think the damages arising from the non-delivery by Heitmann to Heinburger were too remote. In ordinary cases, “where the article is one which can be bought in the market, “the proper measure of damages for breach of a contract “to deliver is the difference between the contract price “and the market price on the day of the breach . . . “there was no market price to which resort could be had as “a test of damage. We must, therefore, ascertain what was “the value of the article contracted for at the time it ought “to have been and at the time when it actually was delivered. “Now, the value of such an article as this depends upon the “existence of facilities for its transport to the place for “which it is destined. If the caustic soda had been forwarded to Hull at the times contracted for, it was capable “of being sent to St. Petersburg. When it was delivered, “it was also capable of being sent to St. Petersburg, but “only at a greater cost for freight and insurance than would “have been incurred if it had been delivered in due course “at Hull. It necessarily follows, therefore, that the soda “was worth less when it was delivered, by the difference “between the cost of forwarding it at that time to St. Petersburg and what the cost would have been if delivered at “the times mentioned in the contract. The plaintiffs are “clearly entitled to recover that as the direct and natural “consequence of the defendant’s breach of contract.”

In the case of *Cory v. The Thames Ironworks and Ship-*

building Co., Ltd. (a), in 1868, the defendants, who were shipbuilders, having had a large vessel, called a derrick, thrown on their hands in consequence of the buyer's insolvency, agreed to sell it to the plaintiffs, and to deliver it on the 1st of January following, but were unable to do so until July. The vessel was the first of the kind ever built in this country, and the use to which the plaintiffs intended to put her was quite novel. The most obvious use to which she could be applied was as a hulk for storing coals, and the defendants, at the time of entering into the agreement, believed that the derrick was to be so used. If she had been intended for that purpose, the plaintiffs would have suffered damage to the extent of 420*l.* But the plaintiffs wanted her for a special purpose, and had purchased machinery and two steam-tugs to use with her, which were comparatively useless in consequence of the unpunctual delivery. The plaintiffs also lost large profits which they would have made by the special use. It was admitted, as to all damages, except the 420*l.*, that the plaintiffs were not, according to *Hadley v. Bazendale (b)*, entitled to recover them, the defendants not having known the special purpose for which the derrick was bought. The defendants contended that the plaintiffs were not entitled to the 420*l.*, inasmuch as they had never contemplated using the derrick as a coal store, and could not, therefore, have suffered damage by being unable so to use her; and that, as the derrick was an entirely novel construction, any use she could be put to was novel, and therefore the loss neither arose according to the usual course of things, nor was such as both parties contemplated as the probable result of a breach. The Court, consisting of Cockburn, C. J., Blackburn and Mellor, JJ., held that the plaintiffs were entitled to recover the 420*l.* Blackburn, J., in his judgment, said that "argument would come to this, that the damages could never "be anything but what both parties contemplated; and "where the buyer intended to apply the thing to a purpose

(a) *Cory v. Thames Ironworks*, 37 L. J. Q. B. 68; L. R. 3 Q. B. 181.

(b) *Hadley v. Bazendale*, 23 L. J. Ex. 179; 9 Ex. 341.

“which would make the damages greater, and did not intend to apply it to the purpose which the seller supposed he intended to apply it, the consequence would be to set the defendant free altogether. That would not be just, and I do not think that was at all meant to be expressed in *Hadley v. Baxendale* (a). Here the arbitrator has found that what the defendants supposed (when they were agreeing to furnish the derrick) was, that it was to be employed in the most obvious manner to earn money, which the arbitrator assesses at 420*l.* during the six months’ delay; and, as I believe the natural consequence of not delivering the derrick was that that sum was lost, I think the plaintiffs should recover to that extent.”

In the case of *France v. Gaudet* (b), in 1871, the facts were these. A Captain Hodder, whose ship was about to sail, agreed with the plaintiff to buy from him 100 cases of champagne at 24*s.* a dozen. The plaintiff then purchased from a broker named Restall, and obtained from him the delivery warrants for 100 cases of champagne of the quality he had sold to Hodder, at 14*s.* a dozen, then lying at the defendants’ wharf. The defendants refused to deliver the wine. Wine of that quality could not be procured in the market in time to supply Hodder, and the Court, consisting of Mellor, Lush, and Hannen, JJ., held that the plaintiff was entitled to recover as damages the difference between 14*s.* and 24*s.*, on the general rule that a plaintiff is entitled to the difference between the contract price and the value of the goods at the time for delivery, that that value could not here be ascertained in the market, but that a *bona fide* sale having taken place, the champagne had acquired an actual value of 24*s.* per dozen.

In the case of *Hinde v. Liddell* (c), in 1875, the defendants contracted for the sale to the plaintiff of 2,000 grey shirtings, “delivery, October 20th, certain.” The defendants had to get the shirtings made according to sample, and on the 15th

(a) *Hadley v. Baxendale*, see ante p. 548.

(b) *France v. Gaudet*, 40 L. J. Q. B. 121; L. R. 6 Q. B. 199.

(c) *Hinde v. Liddell*, 44 L. J. Q. B. 105; L. R. 10 Q. B. 265.

of October informed the plaintiff that they could not execute the order by the time specified. The plaintiff at once tried to purchase other shirtings like those ordered, and being unable to do so, bought shirtings better in quality, but as nearly the same as those contracted for, as he was able, at a slightly advanced price, and these he delivered to his buyer at the contract price. The price paid by the plaintiff was 137*l.* 10*s.* more than he had contracted to pay the defendants; and the goods so purchased were found to be 87*l.* 10*s.* better than those contracted for. The defendants contended that the plaintiff was only entitled to recover the differences. Blackburn, J., said: "There was no market for this particular description of shirtings, and therefore no market price: in such a case, the measure of damages is the value of the thing at the time of the breach of contract, and that must be the price of the best substitute procurable." And the Court held that the plaintiff was entitled to recover 137*l.* 10*s.*

In *Berghem v. The Blaenavon Iron Co. (a)*, in 1875, the action was to recover damages from the seller for late delivery. The contract was for 5,000 tons of rails, the delivery to commence by the 15th of January, and to be completed by the 15th of May. "In the event of the makers exceeding the time for delivery above stipulated, they shall pay, by way of fine, the sum of 7*s.* 6*d.* per ton per week." The defendants delivered the iron in May, June, July, August, and September, and the Court held that the fine ought to be calculated from the time at which the contract ought to have been completed, viz., the 15th of May.

In *The Elbinger Actien-Gesellschaft v. Armstrong (b)*, in 1875, the defendant had contracted to deliver 666 sets of wheels and axles, for shipment from Hull: the first 100 sets were to be delivered by the 15th of April, and were not so delivered. The plaintiffs, before entering into the contract,

(a) *Berghem v. The Blaenavon Iron Co.*, 44 L. J. Q. B. 92; L. R. 10 Q. B. 319.

(b) *Elbinger Actien-Gesellschaft v. Armstrong*, 43 L. J. Q. B. 211; L. R. 9 Q. B. 473. See also *Grébert-Borgnis v. Nugent*, 15 Q. B. D. 85.

had informed the defendant that the wheels were for delivery to a Russian company, under penalties. The plaintiffs were unable to procure other sets of wheels, and paid the Russian company one rouble for each day's delay of each set of wheels, amounting to 100*l.* 13*s.* No question was left to the jury, but the Judge directed a verdict for this amount to be entered for the plaintiffs. Blackburn, J., delivering the judgment of the Court, said: "If we thought that this amount could only be come at by laying down as a proposition of law that the plaintiffs were entitled to recover the penalties actually paid to the Russian company, we should pause before we allowed the verdict to stand. . . . If the Judge had told the jury expressly that the penalties as such could not be recovered, but that the plaintiffs were entitled to such damage as in their opinion would be fair compensation for the loss which would naturally arise from the delay, including therein the probable liability of the plaintiffs to damages by reason of the breach through the defendant's default of that contract to which, as both parties knew, the defendant's contract with the plaintiffs was subsidiary, the direction would not, at all events, have been too unfavourable to the defendant."

In the case of the *Hydraulic Engineering Co., v. McHaffie* (a), in 1878, the plaintiffs, who contracted to supply a "gun-powder pile driver" to Justice, sub-contracted with the defendants to make a part of the machine, telling them that the machine was to be delivered to Justice by the end of August, and it was agreed in the sub-contract, which was made about the end of July, that the defendants were to finish that part "as soon as possible" (b). The defendants did not deliver the part until the end of September, when Justice refused to accept the machine, and as it was unsaleable, it was of no value except as old iron, and it was agreed that the defendants should take it. The defendants' only excuse for the

(a) *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670.

(b) For the meaning of these words, see *Attwood v. Emery*, 26 L. J. C. P. 73; 1 C. B. N. S. 110.

delay was that they had not in their employ a workman competent to do the work. Field, J., held that the plaintiffs were entitled to recover for the expenditure they had uselessly incurred, and for the loss of profit upon their contract with Justice, and this judgment was affirmed by Bramwell, Brett, and Cotton, L. JJ.

Interest.

The remaining question is, whether, when one party does not pay a debt owing to another, the other can recover interest on the money so detained, or damages for its detention: as where the buyer refuses to pay for goods which have been delivered to him. There were many cases on this subject in the early part of the century, not always in harmony, and the law is not quite free from ambiguity at the present date; but the general rule is now quite settled in accordance with the dictum of Abbott, C. J., in the case of *Higgins v. Sargent* (a), in 1823. "It is now established as a general principle, that "interest is allowed by law only upon mercantile securities, "or in those cases where there has been an express promise "to pay interest, or where such promise is to be implied from "the usage of trade or other circumstances."

Although it is here stated that interest is recoverable on mercantile securities, it is probably more exact to say that where interest has not been expressly contracted for on the face of the instrument, it is not recovered as such, but as damages for the detention of the debt, to which, on mercantile securities, the plaintiff is generally entitled by the usage of trade, but at the discretion of the jury (b). And if the defendant undertook to give his acceptance, and then refused to do so, the plaintiff is entitled as if the acceptance had been given (c).

(a) *Higgins v. Sargent*, 2 B. & C. 348.

(b) *Cameron v. Smith*, in 1819, 2 B. & A. 305; *In re Burgess*, in 1818, 8 Taunt. 660; *Keene v. Keene*, in 1857, 27 L. J. C. P. 28; 3 C. B. N. S. 145. For interest on a mortgage deed, see *In re Roberts*, 14 Ch. D. 49.

(c) *Slack v. Lowell*, in 1810, 3 Taunt. 157; *Porter v. Palsgrave*, 2 Camp. 472; *Attwood v. Taylor*, in 1840, 1 M. & Gr. 280; *Marshall v. Poole*, 13 East, 98; *Davis v. Smyth*, 8 M. & W. 399.

Section 54 of the Sale of Goods Act provides that “nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.”

There is no difficulty where the promise to pay interest is an express one, as in *Harrison v. Allen* (a), in 1824, where the defendant had jewellery sent to him, on the understanding that if he did not return it within twelve months he should pay a certain price for it, with interest. The jury gave interest, and the Court refused to disturb the verdict.

An agreement to pay interest may be implied from the course of dealing between two parties.

In *Re Marquis of Anglesey* (b), in 1901, it was proved that a tradesman had, in his yearly accounts, charged his customer with interest on amounts due for three years and longer. This charge had never been objected to, and the customer had from time to time made payments on account. Held, that there was evidence of an agreement to pay interest on the terms on which it was actually charged to him.

In the cases of *Johnson v. Bland* (c), in 1760, and *Parker v. Hutchinson* (d), in 1796, the Court probably considered there was an implied contract to pay interest.

The general rule is that the plaintiff is not entitled to interest; and from the following cases it will be seen that there is no implied promise to pay interest where there has been a sale of goods, money lent, or a balance of an account struck, nor does it make any difference that the debt was a sum certain payable on a given day (e), or that the sale was on credit, or that the plaintiff had demanded the money.

(a) *Harrison v. Allen*, 4 Bing. 4.

(b) *Re Marquis of Anglesey* (1901), 2 Ch. 548.

(c) *Johnson v. Bland*, 2 Burr. 1086.

(d) *Parker v. Hutchinson*, 3 Ves. 133; *Mountford v. Willes*, 2 B. & P. 337; *Arnott v. Redfern*, 3 Bing. 360.

(e) *Per Holroyd, J.*, in *Higgins v. Sargent*, 2 B. & C. 352; *Cook v. Wood*, L. R. 7 E. & I. Ap. 27.

Thus in *Chalie v. Duke of York* (a), in 1806, the plaintiff, in the course of dealings with the defendant, had supplied him with wine. In 1800 the account showed a balance in favour of the plaintiff, on which he claimed interest, but Lord Ellenborough, C. J., refused it.

In *Havilland v. Bowerbank* (b), in 1807, Lord Ellenborough again refused to allow interest on certain sums of money belonging to the plaintiff in the defendant's hands, which the plaintiff had demanded two years before the action.

In *Gordon v. Swan* (c), in 1810, the contract was for the sale of 150 tons of copper at 84*l.* a ton, "payable at six months;" the question was whether interest could be recovered from the expiration of the six months. It was argued for the plaintiff that the fixing of a particular day for the payment for the goods showed an intention to pay interest from that date. But the Court, one of whom was Lord Ellenborough, C. J., refused to allow it.

The credit is for the benefit of the buyer; it is an agreement between the parties that until the expiration of the credit, the buyer shall not be sued for the money. It is not a promise by implication to pay interest from the expiration of the credit.

The case of *Calton v. Bragg* (d), in 1812, has been often cited as an authority. At the trial it appeared that there was a running account between the plaintiff and defendant, and that the plaintiff had from time to time supplied the defendant with goods, and lent him sums of money. The defendant had paid for the goods and repaid the sums lent, but refused to pay the interest, for which this action was brought. Lord Ellenborough, C. J., Grose and Bayley, JJ., held it could not be recovered. It was contended on the plaintiff's behalf that interest should be paid, because the lender would otherwise lose the benefit which he might have

(a) *Chalie v. Duke of York*, 6 Esp. 45.

(b) *Havilland v. Bowerbank*, 1 Camp. 50; *Bernales v. Fuller*, in 1810, 2 Camp. 426.

(c) *Gordon v. Swan*, 2 Camp. 429; 12 East, 419.

(d) *Calton v. Bragg*, 15 East, 223.

derived from the use of his capital, and that the lender ought in equity to be put in the same situation as if he had applied his principal to his own use. Grose, J., said: "It is the lender's own fault if he do not contract for interest when he advances the money" (a).

In the year 1833 an Act, 3 & 4 Will. 4, c. 42, was passed, enacting by s. 28, "that upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand, until the term of payment. Provided that interest shall be payable in all cases in which it is now payable by law"—and a Judge has, of course, the same power.

There appear to be very few reported cases on this section. In *Taylor v. Holt* (b), in 1864, the defendant wrote to the plaintiff, "Could you do me the favour to lend me 10l. until Monday." The plaintiff never gave any notice that he should claim interest; and the Court held that this was not a debt "payable by virtue of some written instrument at a certain time." It seems clear that such a request, although it forms part of the contract for the loan, when read by itself apart from what took place afterwards, does not make the debt payable at a certain time. The offer, for anything appearing on the face of it, might or might not have been accepted with a modification as to time: as Bramwell, B., put it, it "was not a written instrument which sets forth an obligation to pay at a certain time."

(a) *Higgins v. Sargent*, in 1828, 2 B. & C. 348; *Shaw v. Piton*, in 1825, 4 B. & C. 723; *Page v. Newman*, in 1829, 9 B. & C. 378; *Foster v. Western*, in 1830, 6 Bing. 709; *Fruhling v. Schroder*, in 1835, 2 Scott, 144; *Rhodes v. Rhodes*, in 1860, 29 L. J. Ch. 418.

(b) *Taylor v. Holt*, 34 L. J. Ex. 1; 3 H. & C. 454, n.

Geake v. Ross (a), in 1875, was an action for goods sold and delivered. The plaintiff had supplied coal to the Treweatha Mine Co., and had written to the defendant, the secretary, "I must now give you notice that if my account " with this mine be not settled on or before the 1st day of " November next, I shall instruct my solicitor to take the " necessary proceedings to recover the money this company " owes me ;" and this was held by Lord Coleridge, C. J., and Grove, J., to be a sufficient demand, and notice that interest would be claimed (b).

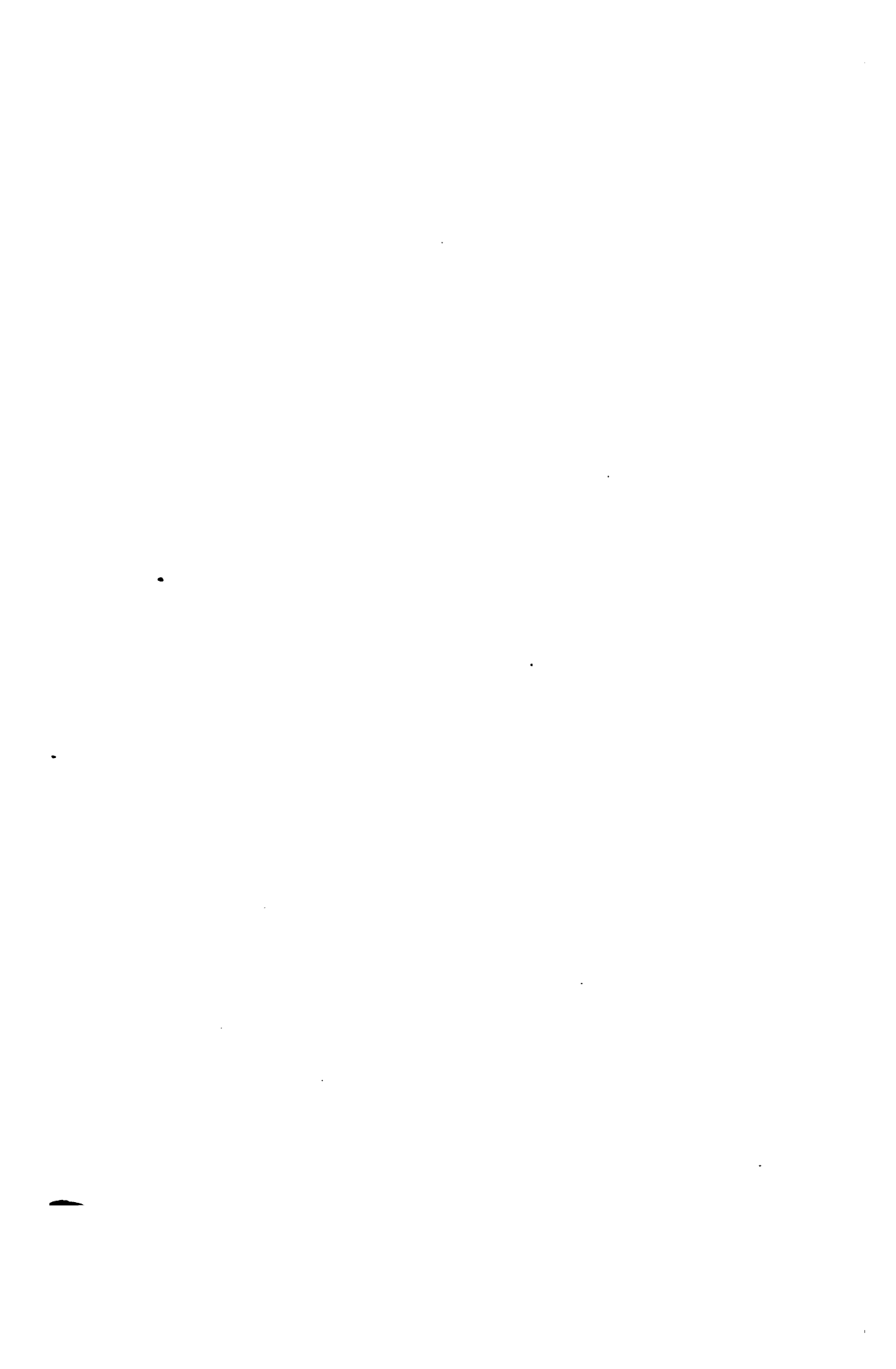
In *Duncombe v. Brighton Club Co.* (c), in 1875, the plaintiff supplied furniture for the defendant's hotel on the terms " one third in cash, and bills at six and twelve months for the " balance." The defendant failed to pay the whole of the third in cash on delivery, but paid the unpaid part later on, and the question was whether the plaintiff was entitled to interest on the unpaid part. The Judges differed as to the meaning of the words of the section " payable by virtue of some " written instrument at a certain time." Mellor and Lush, JJ., being of opinion that the section does not require that the actual day should be ascertained upon the face of the instrument, but that it was sufficient if the basis of the calculation by which it could be made certain was to be found in the instrument. Blackburn, J., took a different view, but said, whatever the law is, in fairness " wherever there is a debt " at all it should bear interest, unless there is some strong " reason to the contrary " (d).

(a) *Geake v. Ross*, 44 L. J. C. P. 315.

(b) See also *Hill v. South Staffordshire Ry. Co.*, in 1874, 43 L. J. Ch. 556; L. R. 18 Eq. 154; and *Ward v. Eyre*, in 1880, 15 Ch. D. 130, as to what is a "demand," and a "debt or sum certain payable," Jessel, M. R., saying that a demand for the balance of an account, is not a demand for a "debt or sum certain payable."

(c) *Duncombe v. Brighton Club Co.*, 44 L. J. Q. B. 216; L. R. 10 Q. B. 371.

(d) See also Lord Cairne's remarks in *Rodger v. Comptoir d'Escompte de Paris*, 38 L. J. P. C. 30; L. R. 3 P. C. C. 475; and 1 & 2 Vict. c. 110, s. 17, for interest on judgment debts. See also *London, Chatham & Dover Ry. Co. v. South Eastern Ry. Co.*, [1893] App. Ca. 429.



Damages where title fails. A purchaser from one who has no title was held in Ontario to be entitled to recover as damages the value of the chattel, and not merely the amount paid therefor. In *Confederation Life Association v. Labatt*, 27 O. A. R. 321, Osler, J. A., said: "As to the MacWillie Company, they undoubtedly sold as owners, and cannot successfully deny their liability to indemnify their vendee, *Eicholz v. Bannister* (1864), 17 C. B. N. S. 708, but they contend that recovery as against them must be limited to the amount of the purchase money paid by Labatt. There is no case in the English courts or our own which expressly decides that unliquidated damages may be recovered on the breach of an implied warranty of title. In all the reported decisions on the subject, the recovery has been confined to the price paid, but in all these cases the claim was simply one to recover back money paid as upon a failure of consideration, *Eicholz v. Bannister* (1864), 17 C. B. N. S. 708, *Peuchen v. Burt & Co.* (1884), Cab. & Ell. 325, *Peuchen v. Imperial Bank* (1890), 20 O. R. 325.

"In Benjamin on Sales (1899), 7th Am. Ed., from the Eng. Ed. of 1892, and in earlier editions published in the author's lifetime, it is said: '*Eicholz v. Bannister* was on the money counts and therefore, strictly speaking, only decides that the price may be recovered back from the buyer on the failure of title to the thing sold; but as the *ratio decidendi* was that there was a warranty implied as part of the contract, there seems no reason to doubt that the vendor would also be liable for unliquidated damages for breach of warranty.' In the fourth edition of Judge Chalmers' work on 'The Bills of Sale Act, 1893,' it is pointed out that this suggestion has been adopted in that Act. In the most recent edition of Mayne on Damages (1899), the subject is not noticed. In America there is much diversity of opinion, both in the text writers and decisions. In Sedgewick on Damages, 8th Ed. (1891), Vol. 2, p. 492, the general rule is said to be that 'the measure of damages for breach of

Footnote :- The notes in this section refer mainly to questions as to amount of damages. Cases as to liability for damages are naturally found in the chapters on breach of warranty, etc. But it has been found impossible to exclude from this section cases as to liability in which questions as to quantum are also raised.

“ ‘ warranty of title to a chattel is the value of the chattel
“ ‘ at the time of the purchase, with interest and the neces-
“ ‘ sary costs of defending a suit brought against a vendee
“ ‘ to test the title, with interest from the time of payment.
“ ‘ But the vendee may disaffirm the contract and recover
“ ‘ the consideration paid, though that is greater than the
“ ‘ value of the property.’ ”

“ It is remarkable that the editors do not discuss or even
“ refer to *Eicholz v. Bannister*, one of the two leading Eng-
“ lish cases on the question of an implied warranty of title,
“ and cite only *Morley v. Attenborough* (1849), 3 Ex. 500,
“ for the English law on the subject.

“ In *Sutherland on Damages* (1882), Vol. 2, pp. 418, 419,
“ it is said: ‘ The value of the property at the time the
“ ‘ vendee is dispossessed has been held to be the measure
“ ‘ of damages. Generally, however, the measure has been
“ ‘ stated to be the purchase money and interest, thus
“ ‘ adopting the same rule that is applied generally in esti-
“ ‘ mating the damages for breach of covenants for title
“ ‘ to real estate. . . . Where the vendee is dispos-
“ ‘ sessed by suit, and has, in good faith, incurred expenses
“ ‘ in defending it, he is entitled to recover those also from
“ ‘ the vendor as an additional item of damages.’ ”

“ It appears to me that the law is accurately stated in
“ the passage quoted from Mr. Benjamin’s learned work,
“ and that the vendee, going upon a breach of the implied
“ warranty, is entitled to recover the value of the thing he
“ has lost in consequence of the failure of the vendor’s title.
“ Can less be supposed to have been in the contemplation
“ of the parties when the sale was made? Why should a
“ loss by failure of title be less fully compensated than a
“ loss by breach of warranty of quality? The case ap-
“ pears to fall fairly within the general rule of the common
“ law, as stated by Parke, B., in *Robinson v. Harman*
“ (1848), 1 Ex. at p. 855, that ‘ where a party sustains a
“ ‘ loss by reason of a breach of contract, he is, so far as
“ ‘ money can do it, to be placed in the same situation, with
“ ‘ respect to damages, as if the contract had been per-
“ ‘ formed.’ ”

*Conditional sale. Evidence may be given of non-compli-
ance with warranty to reduce damages. In Cull v. Roberts,*

28 O. R. 591, an agreement was made for the sale of machinery, a note being taken for the price, or, rather, an agreement called a note, by which it was stipulated that if the note was not paid, or if the purchaser should dispose of his land or personal property, etc., the vendor might retake the property and sell the same, possession to be kept in the meantime by the purchaser. The defendant set up the defective character of the machinery as a breach of warranty, but was not allowed, at the trial by the County Court Judge, to give evidence of it. It was sought in the argument to distinguish between this case of a conditional sale and the case of *Church v. Abell*, which was a straight sale. Per Boyd, Chancellor, *Tomlinson v. Morris*, 12 O.R. 311, "is not opposed, but rather favorable to the view that in case of a conditional sale of a machine, if the price is sued for, the defendant may show that the machine was not as warranted, and so reduce the claim by the difference between the value of the machine as warranted and its actual value in fact."

Compare *Copeland v. Hamilton*, 9 Manitoba 143.

Damages governed by market price. Where the defendant failed to deliver according to contract, the plaintiff's damages were held to be the difference between the contract price and the market price. Defendants sought to reduce this amount by saying that the plaintiff had contracted to sell the goods at a lower price, so that he had not in reality lost as much as he was claiming. "But," said Osler, J., "this is not the way to look at it. The defendant has nothing to do with the profit the plaintiff might have made. Assuming that the plaintiff sold this cheese, he was not able to deliver it, for he had not got it from the defendant. If the sub-sale went off for that reason, the plaintiff was not thereby disentitled from going into the market and purchasing the same quantity at the market price, which was ten cents per pound, but it is perhaps not assuming too much to infer that he filled the sub-contract by the delivery of other cheese which he would have had to purchase in the market at the increased price, or to supply from his own stock, which was then worth to him ten cents per pound. In either case he would sustain a loss of four cents. There seems no reason, therefore, to reduce the damages." *Ballantyne v. Watson*, 30 U. C. C. P. 529.

Notice of purpose for which goods required. Damages in such case. In *Watrous v. Bates et al.*, 5 U. C. C. P. 366, defendants agreed to furnish plaintiff with railway ties to enable them to carry out a contract for the supply of ties to Sykes & Co. The trial judge directed the jury that the measure of plaintiff's damages was the difference between what he was to pay defendant for the ties and the price he was to receive from Sykes & Co. Although the profits to be made on the article contracted for are in general too remote to be considered as damages for a breach of contract, this principle is subject to be controlled by the circumstances of the particular case. The words of Baron Alderson in *Hadley v. Baxendale*, were quoted: "That if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate would be the amount of the injury which would ordinarily follow from the breach of the contract, under these special circumstances so known and communicated."

An attempt was made to apply this principle in *Feehan v. Hallinan*, 13 U. C. R. 440, the purpose for which cordwood was bought being the burning of bricks, and the defendant having failed to supply wood according to his contract. Plaintiff claimed that he was entitled to recover damages occasioned by the fall in the price of bricks while he was waiting for the wood. It does not appear that the purpose for which the wood was bought was communicated, but the judgment does not seem to proceed upon this ground. It reads as if the damages would have been considered remote under any circumstances.

"The plaintiff's case shows nothing more than that he dealt with the bricks which he intended to make and burn, in the same manner that a merchant would do with goods which he was importing, viz., that he took his chances and incurred the risk of a rising or falling market. In such a case the mere ordinary chances of the market cannot be supposed to have entered into the mind of the parties when the bargain was made for the delivery of the wood. If the fluctuations of the market are

“ to form an ingredient in estimating damages in such a
“ case as the present, then the contract must be specially
“ with reference to that. The contract here is not made
“ for bricks, in which case the rise and fall might have
“ had some bearing on the question, but the contract is for
“ wood to burn the bricks, and therefore the immediate
“ damage is that which is connected with the price of wood
“ at that time.”

Contract price of goods fifty-two dollars, damages three hundred and ninety-seven dollars. Held not excessive for failing to supply them. The contract in *Lalor v. Burrows*, 18 U.C.C.P. 321, was to furnish one hundred and eighty sets of locks of malleablized iron. Damages were claimed in a lump sum of between \$700 and \$800, and the jury awarded \$397.50, without specifying the items allowed. The court held that there might be damages amounting to this sum and discussed the law as to the various items that might be claimed for, saying, among other things: “ If the plaintiff
“ be entitled to procure other goods by reason of the defendant’s failure of contract, it makes no difference to him
“ how little he paid, or was to pay the defendant for them,
“ or how much he had to pay to procure or replace them.
“ The damages the defendant may be liable to pay may be
“ enormously beyond any profit or price he was ever to
“ receive for his work, as in *Wilson v. The Newport Co.*,
“ L. R. 1 Ex. 177, and as often happens when a lawyer, who
“ was to get a few dollars for searching a title, has to pay
“ the whole value of the property by reason of some defect
“ which he should have guarded against; or, when a surgeon who is to get a few dollars for his services, is called
“ upon to pay for the loss of a limb, or some other misfortune which his patient has suffered from his alleged
“ neglect, far beyond the trifling sum which was to have
“ been his compensation.”

Damages for goods not delivered according to contract. In *Colton v. Good*, 11 U. C. Q. B. 155, the plaintiff claimed as damages for the delivery of mill stones not according to the contract, the cost of endeavoring to repair the stones and expenses of dressing them and the damage done to his mill machinery by the broken stones. It was held that he could recover the cost of dressing the useless stones on the

same principle as expenses incurred with respect to articles bought in the confidence that they would prove such as the vendor was bound to furnish. The cost of repairing the damage to the machinery was also allowed, the jury being satisfied that the breaking of the stones was not such an accident as could not be fairly charged against the manufacturer, but was occasioned by their not being secured by a sound and strong iron band as usual. The expense of attempting to repair the broken stones was not allowed. The plaintiff had done this on his own responsibility; he could have rejected the stones and recovered back what he had paid for them. He could not be allowed to recover back the amount paid for the stones and also the cost of attempting to repair them.

Note the difference between recovering the cost of dressing the stones under the assumption that they were such as the plaintiff was bound to accept, and the cost of attempting to repair them after it was clear that the plaintiff would be justified in refusing acceptance.

Recovery of deposit where vendor wrongfully sold goods. The plaintiff purchased cattle to be kept by the defendant until fit for the English market and paid a deposit of two hundred dollars. Defendant considered that he was not bound to keep them beyond August 20th, and insisted upon plaintiff taking them off his hands, notifying him that if he did not do so they would be re-sold. Plaintiff refusing to take them until the proper time, the defendant did sell them and claimed to retain the deposit. It was held that the plaintiff could waive the breach of the contract and sue simply for the recovery of the money paid. *Murray v. Hutchinson*, 14 O. A. R. 489.

Purchaser must accept delivery in reasonable time. Damages for refusal. Where a specified quantity of hay was sold to be delivered at a specified place, at such times and in such quantities as the purchaser might order, it was held that the purchaser must accept the hay tendered within a reasonable time, and that the measure of damages was the difference between the contract price and the market price or value on the day fixed for delivery, or in the present case, the day when the hay was tendered to the defendant and he should have taken delivery, that being the time when the contract was broken. The plaintiff was not bound to

re-sell the hay, though he might, if he thought proper, have done so and charged the vendee with the difference between the contract price and the price realized at the sale. But it would be requisite, in such a case, to show that the hay was sold for a fair price and within a reasonable time after the breach of the contract. The plaintiff was also allowed for extra expenses which he had incurred owing to the refusal of the defendant to fulfil his contract, such as labour, cartage, storage, weighing and selling the hay. *Chapman v. Larin*, 4 S.C.R. 349.

Damages for refusal to accept where the contract was to deliver wood in instalments and after one instalment had been delivered. The plaintiff in *Moore v. Logan*, 5 U.C.C.P. 294, received as damages the difference between the contract price and the selling price "at the time the contract was broken or to be performed." These periods are not necessarily the same, but the case does not discriminate and is of no value on the question which is discussed, which is the proper time at which to take the selling price, whether it is the time when the instalments were to be delivered, or the time when the defendant refused to accept further instalments and thus broke the contract. On the whole, it is not a very valuable case.

In *Brunskill v. Mair*, 15 U.C.Q.B. 213, the defendant failed to accept a quantity of flour delivered at Oswego, in consequence of which the plaintiff was obliged to resell. He was held entitled to recover the difference between the contract price and the price at which he had been obliged to resell at Oswego. The defendant was contending that the price at Toronto should govern, but this contention was overruled, as the plaintiff was at liberty to deliver it at Oswego.

Damages for refusing to accept deed of transfer. The plaintiff sued in an action, among other things, for the refusal to accept the deed of a vessel sold by plaintiff to defendant and of which the defendant had received possession. The jury gave as damages the whole value of the vessel and the court declined to disturb the verdict. The defendant was objecting that no title to the vessel had passed to him for want of the transfer under the provisions of 8 Vic. ch. 5, but the court held that it was not competent for him to set up such a defence, as he had refused to accept the transfer. *Phillips v. Merrit*, 2 U.C.C.P. 513.

MISCELLANEOUS CASES.

Construction of Contract.

Guarantor or principal debtor. Goods were delivered to one Thomas Billings on the strength of an order in the following form: "Mr. Dickson, please let the bearer, " Thomas Billings, have goods he may require and charge. " Yours. M. Hutchinson." It was agreed by Draper, C.J., and Richards, J., that this did not amount to a guarantee, but the learned judges differed as to the liability of the defendant on the common counts for goods sold and delivered, because of the fact that the goods were charged by the vendor to Billings, i.e., they were entered in Billings' pass book, headed "Mr. Billings in account with Alexander " Dickson & Son," and were not charged against Hutchinson. Richards, J., said that the memorandum signed by defendant did not seem to him to be in the form of a guarantee, but rather an order to deliver the goods to Billings, for which the defendant was to be primarily liable, but whether he would be primarily liable or not depended upon the fact whether credit was given to him as a principal, and he thought, under the evidence, that it was not so given. If the credit was not so given, then in the event of his paying the debt, he could sue Billings for the amount paid. His Lordship cited the case of *Simpson v. Penton*, 2 Cr. & M. 430, and concluded that if in the present case the party primarily liable was Billings, the plaintiffs having sold the goods to him, expecting to hold the defendant liable as a guarantor, then the defendant could not be sued for goods sold and delivered. *Graset et al v. Hutchinson*, 10 U.C.C.P. 265. Compare *Ogilvie v. McLeod*, 11 U.C.C.P. 348.

Contract to pay as delivered. The plaintiff contracted to sell all the lumber which the new saw logs at plaintiff's mill would produce, payment to be made for the lumber as delivered. Seventy-five thousand feet were delivered, but defendant refused to pay for them, contending that he was not to pay for any until the whole lot of logs was sawed into lumber, but it was held that the stipulation as to payment for the lumber as delivered was an answer to this contention. *Cox v. Jones*, 24 U.C.Q.B. 81.

Machinery sold with special provision for lien on land upon delivery. In *Rustin v. Fairchild Co.*, 39 S.C.B. 274, an agreement for the sale of machinery provided for the delivery by the purchaser to the vendor of a mortgage on the land at the time of the delivery of the machinery as herein provided or upon demand, etc. The agreement contained a number of details and the question turned upon the construction of the agreement. The Supreme Court of Canada held, reversing the judgment of the Supreme Court of Manitoba, that the right of the company to hold a lien on the land for the machinery must depend upon the interpretation of the agreement as a whole and that the provision for a lien became operative only in the case of a complete delivery of the machinery, which had never been made. The alternative words, "or upon demand," had reference to a demand made after such complete delivery.

Carload of hogs ordered. Option of vendor to send double-decked car. In *Hanley v. Canadian Packing Co.*, 21 O. A. B. 119, the question arose on a contract to send a carload of hogs, whether the vendor could send a double-decked car loaded with hogs. The market having fallen, the purchaser was claiming that he had ordered the smaller quantity. There was no evidence to establish by usage a meaning of the term "carload." Sometimes hogs were sent in single-decked cars and sometimes in double-decked. Under these circumstances, the majority of the Court of Appeal held that the vendor had the option to send a double-decked car, and the purchaser could not refuse. MacLennan, C.J., put the case on the ground of the vendor's right to elect, under the rule in *Hayward's case*, that when, from the nature of an agreement, an election is to be made, the party who is, by the agreement, to do the first act which, from its nature, cannot be done till the election is determined, has authority to make the choice, in order that he may perform his part of the agreement. Osler, J.A., cited a case of *McAdie v. Sills*, 24 C. P. 606, in which the defendant gave plaintiff an agreement, "Due W. M. \$100 payable in lumber," and the plaintiff, claiming that he was entitled to have merchantable lumber, Gwynne, J., had held that it was unnecessary for defendant to prove an agreement that an inferior kind of lumber

should suffice, because the delivery of anything coming within the description of the general term, "lumber," to the value of \$100, would have been a fulfilment of the contract. So in *Smith v. Jeffries*, 15 M. & W. 561, where the defendant contracted to sell plaintiff sixty tons of trade potatoes, the defendant was held to have fulfilled his contract by delivering "kidney wares," although not the best kind, and not the kind that the purchaser contended he had contracted for. "In both these cases the option lay "with the defendant, who was to do the first act, in the one "to deliver an inferior or a better class of lumber, in the "other to deliver the inferior or the better class of trade "potatoes, and he not unnaturally took advantage of the "option to perform the contract in the way least onerous "to himself. . . . The dispute here happens to be about "the quantity, while in the cases referred to it was about "the quality of the article, but that can make no difference." The suggestion that the terms were so uncertain that there was no contract was discussed, but rejected. It was no more uncertain than a contract to sell from one to two hundred hogs at so much per hundred.

It is to be observed in regard to the case of *McAdie v. Sills*, that the question before the court was as to the introduction of evidence to show an agreement that culls and firsts were intended, and the decision was merely that parol evidence was admissible. There was no decision that, in the absence of such evidence, the defendant would have performed his contract by the delivery of unmerchantable lumber. This was only an *obiter dictum* of Gwynne, J.

Authority of Agents and Partners.

Authority of partner to pledge goods. A partner entrusted with possession of goods of his firm, for the purpose of sale, may either as a partner in the business, or as a factor for the firm, pledge them for advances made to him personally, and the lien of the pledge will remain as valid as if the security had been given by the absolute owner of the goods, notwithstanding notice that the contract was with the agent only. This was decided in a case from Quebec, where Donald McBean, a partner of Alexander Dingwall in

a cheese factory, consigned goods to his brother and received large advances from his brother thereon, which he failed to account for to his firm. It was held that George McBean had a lien on the goods for his advances. *Dingwall v. McBean*, 30 S.C.R. 441.

Agent for separate vendors cannot sell the property of both for lump sum. In *Cameron v. Tait*, 15 S.C.R. 622, Muir & Co., acting as agents for two distinct firms, made an agreement to supply the plaintiff with engines and mill machinery for a lump sum of \$6,000. The engines were to be supplied by one firm and the machinery by a different firm, being the defendants. The machinery, it was claimed, was not according to contract and plaintiffs claimed damages for the breach of the contract. It was held that the agent had no authority to bind his principals or either of them by a sale of the goods both in one lot for a lump sum, where the price was not susceptible of a rateable apportionment except at the arbitrary will of the agent, and that the defendants could not be held to have ratified without its being shown that they had expressly or impliedly by conduct, with the full knowledge of all the terms of the agreement come to by the agent, assented to the same terms and agreed to be bound by the contract undertaken on their behalf. There were dissenting opinions by Sir Wm. Ritchie, C.J., and Fournier, J.

Assignee of factor not entitled to goods of principal, nor to proceeds so long as distinguishable. In *Cotter v. Mason* the plaintiff purchased barley, for the price of which he instructed the vendors to draw on one Cummer, who accepted the draft and kept the barley as plaintiff's agent, reimbursing himself by a discount from a bank for which he pledged the warehouse receipt. Plaintiff paid certain sums demanded from time to time to cover possible declines in value and enable Cummer to carry the barley, to use the trade expression. The barley was finally sold by the bank and Cummer's assignee claimed the surplus over the claim of the bank. Cummer had in his correspondence fully recognized the title of the plaintiff in the barley. It was held that the surplus belonged to the plaintiff and that in estimating the surplus he must be credited with the amounts paid as margin. The case is founded on the authority of *Tooke v.*

Hollingworth, 5 T.R. 226, where Lord Kenyon said, "The case of a factor has been so frequently decided and so much taken for granted for a series of years past that it must now be considered at rest. If goods be sent to a factor to be disposed of, who afterwards becomes a bankrupt, and the goods remain distinguishable from the general mass of his property, the principal may receive the goods in specie, and is not driven to the necessity of proving his debt under the commission of bankrupt; nay if the goods be sold and reduced to money, provided that the money be in separate bags and distinguishable from the factor's other property, the law is the same." In this case the money was distinguishable, being a fund in the hands of the banker.

Commission on sale of goods when earned. The plaintiff company was dealing in electric supplies and wired the defendant company that the Windsor electric station was completely burned, fully insured. "Send us quotations for new plant; will look after your interest." Defendant company replied, "Can furnish Windsor 180 kilowatt station two-face complete exciter and switch board four thousand nine hundred dollars, including commission for you, etc." The manager of the appellant firm went to Windsor, but could not effect a sale of his machinery. Shortly after, the agent of the defendant company sold to the Windsor company another and different machine of a much smaller make for \$1,800, and under specific instructions from the head office. It was held that the plaintiffs had no claim to a commission on this sale. The agreement for commission had reference to the sale of the particular kind of machine mentioned in their telegram and the effort to effect this sale had altogether failed. *Starr et al v. Royal Electric Co.*, 30 S.C.R. 384.

Performance of Contract.

Delivery, where not personal, requires notification. Where timber was contracted for, to be delivered, not to the purchaser personally, but at certain parts of the road in sufficient quantities to build certain bridges, it was held to be the duty of the vendor to notify the purchaser of the deliveries, and a declaration was held demurrable for

want of an averment of notice. If the declaration had averred delivery to the defendant, no averment of notice would have been requisite because the delivery would in itself have been notice. Here the defendant could not, without notice, know when the plaintiff was in a position to claim, nor what was the amount of the claim. *Watson v. Gorren et al.*, 6 U. C. Q. B. 542.

Payment at bank. In an early case in Upper Canada Common Pleas it was held on demurrer apparently that payment at a bank did not import a payment into the bank and a declaration that plaintiff had gone to the bank during banking hours and been then ready and willing to pay, but that neither the defendant nor any person on his behalf was at the said bank at any time during the day named for payment, was held good. It was not the agreement that plaintiff should pay the money to the bank in defendant's absence, but it was the place where plaintiff was bound to be with funds or to leave funds, and where the defendant was bound to attend and receive payment. *Platt v. McFaul*, 4 U. C. C. P. 293.

Rescission.

Rescission of contract by consent of parties on purchaser's insolvency. In *Pictou Bank v. Harvey*, 14 S.C.R. 617, the plaintiff Harvey was in the business of sending hides to John Logan, Pictou, with an estimate of weight, for which Logan would give him notes in settlement, subject to adjustment if the rates were found erroneous. A lot of hides was shipped in this way to Pictou, but on being informed of its arrival there Logan caused the goods to be stored in the warehouse of D. Logan, with instructions to keep them for the party who had sent them. He had done the same with other goods. On the same day he telegraphed Harvey: "In trouble. Have stored hides. Appoint someone to take care of them." Harvey accordingly went to Pictou, and on his proposing to take the hides away Logan assured him that they would be all right. It was held that the sale had been rescinded and the property in the hides was in Harvey. The bank having seized them under a transfer from Logan, who was indemnified by the bank, was held to have no title to them.

Purchaser refusing to accept goods because of insolvency. An arrangement between an insolvent purchaser and an unpaid vendor, by which the vendor resumed possession of the goods, was attacked as a fraudulent preference in *Mason v. Redpath et al.*, 39 U. C. Q. B. 157. The cases are examined at length by Harrison, C.J., who summarizes their effect as follows: "The cases, although varying in their facts, show in principle that whether the vendee has accepted goods or not, as and for himself, is a question of fact, and that if, on the facts, there cannot be said to be an actual acceptance of the goods by the vendee as and for himself, and there be the vendor's assent to the refusal, the goods do not pass under a subsequent commission in bankruptcy."

REMEDIES AND PROCEDURE.

Agreement to pay in goods when desired, demand necessary. The defendant made an agreement in writing, in the following terms: "Within three years, and when desired by him, I promise to pay Moses C. Nickerson (the plaintiff) or bearer, fifty pounds currency in such stone and marble work as he may want at cash price, delivered at Port Dover. Value received with interest."

This, of course, was not a promissory note. Under an old statute of Nova Scotia, now repealed, it would import consideration, R.S.N.S. 3rd Series, ch. 82. The point coming before the court for consideration was whether the plaintiff could sue on the agreement without having given notice of a demand, and it was held that the plaintiff was bound to prove a notice of the kind of stone and marble work required and when it was to be delivered, and that until such request there could be no default. The opinion was expressed that plaintiff would be entitled to make demand even after the expiration of the three years. *Nickerson v. Gardner*, 12 U.C.Q.B. 219.

Goods to be paid for in instalments; no action until credit expires. In *Moore v. Kuntz*, 44 U.C.R. 309, goods were bought to be paid for in instalments. An action was brought for the goods sold before the expiration of the credit. Per Cameron, J.: "Upon this evidence it is clear the action can-

“ not be sustained in its present shape, as there is an express contract shown to pay at one, three and six months and not an implied one to pay on request.”

Sale with credit on approved notes. Defendant purchased goods at auction on the following terms: under £2.10 cash down; over that amount and under £125, eleven months' credit on approved endorsed notes with interest. It was held that an action would not lie on the common counts until the time of credit had expired. This case was said to closely resemble *Wakefield v. Gorrie*, 5 U.C.R. 159, in which Robinson, C.J., did not concur in the judgment of the court. He thought that in the present case no action would lie against the defendant as upon an express contract to give a note, but that the agreement was only that the goods were to be paid for on delivery unless an endorsed note was given. Burns, J., thought that the court was bound by the decision in *Wakefield v. Gorrie* until overruled. He thought that as the plaintiff had taken the goods the action should be for not giving the note. In the result the action could not be sustained on the common counts for goods sold and delivered until the expiry of the period of credit. There was no decision on the question whether an immediate action would lie for the failure to give the notes. *Silliman v. McLean*, 13 U.C. Q.B., 544.

Requisites of plea of extension of time to action for non-delivery. To a declaration that the defendant agreed to sell and deliver to the plaintiff, within one week, certain wheat, and that the plaintiff advanced \$600 on account, but yet the defendant did not deliver the wheat, defendant pleaded that before breach it was agreed that the plaintiff should waive the delivery within the week and the plaintiff waived the said delivery and extended the time. This was demurred to and was held to be bad because no subsequent delivery was alleged, nor was it alleged that the extended time had not elapsed. *Molson v. Bradburn*, 15 U.C.R. 293.

Goods delivered in payment for land. On failure to convey land action maintained for goods sold. The plaintiff verbally agreed to purchase land from the defendant and was let into possession and paid a part of the purchase money in money and cattle. Defendant afterwards conveyed the land to another party and promised to repay the

amount plaintiff had paid him. On his failure to do so it was held that the plaintiff could recover for the cattle as goods sold and delivered. *Hill v. Stanton*, 2 U.C.R. 149.

“ One objection raised is that the payments were in cattle, at least for the most part, and that the plaintiff cannot sue for their value as for goods sold and delivered because they were not in fact sold. But we think that the fair effect of the defendant’s promise to pay back the value of what he had received was to authorise the plaintiff to treat the cattle which had been delivered on the repudiated bargain as goods sold. As a person whose goods tortiously taken from him may waive the trespass and consider them as goods sold, so with much more reason may the plaintiff in this case sue for these goods as sold when the defendant has agreed to place the transaction on that footing and to pay their value.

In *Hoskins v. Mitcheson*, 14 U.C.Q.B. 551, the plaintiff verbally agreed to purchase land from the defendant, taking goods in part payment on account of the purchase money, and the plaintiff sued for the value of the goods in an action for goods sold. Robinson, C.J., speaking for the court, said this could not be done. The goods had been received on the special contract to be credited on account of the land. The fact that the contract could not be enforced for the conveyance of the land did not entitle the plaintiff to sue for the goods as goods sold. There was nothing to show that the defendant was repudiating the bargain.

“ If the plaintiff had called upon the defendant to execute an agreement, and he had declined, or had tendered the balance of the purchase money and applied in vain for the deed, he might no doubt have sued for the value of his goods in money, but he has no right to assume that the defendant will disregard the verbal agreement because it is not binding in law, and, without putting him to the proof, treat him as if he had done so.”

Form of action where defendant agrees to pay by bill. It was held in *Counter v. Robuck*, E.T. 33rd Vic., 3 Ont. Dig. 6213, that where the defendant bought pork and agreed to pay for it by bill the plaintiff who had brought his action in assumpsit for goods sold should have brought it for not furnishing the bill and not for goods sold.

Where goods were purchased under an agreement that a note was to be given at three months and the plaintiff sued before the expiration of the three months, it was held that the action was premature; the period of credit had not expired. *McGrath v. Tinning*, 6 O.S.U.C. 484.

Res Judicata. Where wheat was delivered to the plaintiff to be ground into flour and damages were recovered for the value of the wheat so delivered, although part of the wheat had in fact been re-delivered to the defendant, the present plaintiff sued to recover for the part so delivered as for goods sold and delivered. It was held that he could not do this. He should have given in evidence the fact of the partial re-delivery in mitigation of the damages in the former action. *Andrus v. Burwell*, Taylor, 382, U.C.

Vendor cannot sue on delivery of part only. In *McPhail v. Clements*, 1 Man. 165, the defendant ordered goods, some manufactured and some to be manufactured. He contended that the goods were to be shipped not later than the 6th of October, while the plaintiff swore that he had till the 20th of October. On the 16th of October the defendant wrote cancelling the order. The letter was received by the plaintiff on the 19th of October, and on that day he shipped a portion of the goods. In an action for the price of the goods shipped it was held that even if the plaintiff's contention as to the date was correct, the defendant was not bound to accept a portion of the goods, and the letter of the 16th did not excuse a complete performance. The case only decides that the plaintiff could not recover for part of the goods as sent, the contract being entire.

APPENDIX.

STATUTES.

BILLS OF LADING ACT (18 & 19 VICT. c. 111).

An Act to amend the Law relating to Bills of Lading.

[14th August, 1855.]

WHEREAS by the Custom of Merchants a Bill of Lading of Goods being transferable by Endorsement the Property in the Goods may thereby pass to the Endorsee, but nevertheless all Rights in respect of the Contract contained in the Bill of Lading continue in the original Shipper or Owner, and it is expedient that such Rights should pass with the Property : And whereas it frequently happens that the Goods in respect of which Bills of Lading purport to be signed have not been laden on board, and it is proper that such Bills of Lading in the Hands of a *bond fide* Holder for Value should not be questioned by the Master or other Person signing the same on the Ground of the Goods not having been laden as aforesaid : Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. Every Consignee of Goods named in a Bill of Lading, and every Endorsee of a Bill of Lading to whom the Property in the Goods therein mentioned shall pass, upon or by reason of such Consignment or Endorsement, shall have transferred to and vested in him all Rights of Suit, and be subject to the same Liabilities in respect of such Goods as if the Contract contained in the Bill of Lading had been made with himself.

Rights under bills of lading to vest in consignee or endorsee.

II. Nothing herein contained shall prejudice or affect any Right of Stoppage *in transitu*, or any Right to claim Freight against the original Shipper or Owner, or any Liability of the Consignee or Endorsee by reason or in consequence of his being such Consignee or Endorsee, or of his Receipt of the Goods by reason or in consequence of such Consignment or Endorsement.

Not to affect right of stoppage *in transitu* or claims for freight.

III. Every Bill of Lading in the Hands of a Consignee or Endorsee for valuable Consideration representing Goods to have been shipped on board a Vessel shall be conclusive Evidence of such Shipment as against the Master or other

Bill of lading in hands of consignee, &c., conclusive

evidence of
the shipment
as against
master, &c.

Proviso.

Person signing the same, notwithstanding that such Goods or some Part thereof may not have been so shipped, unless such Holder of the Bill of Lading shall have had actual Notice at the Time of receiving the same that the Goods had not been in fact laden on board : Provided, that the Master or other Person so signing may exonerate himself in respect of such Misrepresentation by showing that it was caused without any Default on his Part, and wholly by the Fraud of the Shipper, or of the Holder, or some Person under whom the Holder claims.

FACTORS ACT, 1889 (52 & 53 VICT. c. 45).

ARRANGEMENT OF SECTIONS.

Preliminary.

Section.

1. Definitions.

Dispositions by Mercantile Agents.

2. Powers of mercantile agent with respect to disposition of goods.
3. Effect of pledges of documents of title.
4. Pledge for antecedent debt.
5. Rights acquired by exchange of goods or documents.
6. Agreements through clerks, &c.
7. Provisions as to consignors and consignees.

Disposition by Sellers and Buyers of Goods.

8. Disposition by seller remaining in possession.
9. Disposition by buyer obtaining possession.
10. Effect of transfer of documents on vendor's lien or right of stoppage in transitu.

Supplemental.

11. Mode of transferring documents.
12. Saving for rights of true owner.
13. Saving for common law powers of agent.
14. Repeal.
15. Commencement.
16. Extent of Act.
17. Short title

SCHEDULE.

An Act to amend and consolidate the Factors Act.

[26th August, 1889.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Preliminary.

Definitions.

1. For the purposes of this Act—

- (1) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business

as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods :

- (2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf :
- (3) The expression " goods " shall include wares and merchandise :
- (4) The expression " document of title " shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented :
- (5) The expression " pledge " shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability :
- (6) The expression " person " shall include any body of persons corporate or unincorporate.

Dispositions by Mercantile Agents.

2.—(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same ; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

Powers of mercantile agent with respect to disposition of goods.

(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent ; provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

Effect of pledges of documents title.

Pledge for antecedent debt.

4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

Rights acquired by exchange of goods or documents.

5. The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration ; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

Agreements through clerks, &c.

6. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

Provisions as to consignors and consignees.

7.—(1) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent.

Dispositions by Sellers and Buyers of Goods.

Disposition by seller remaining in possession.

8. Where a person having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

Disposition by buyer obtaining possession.

9. Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the

original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.

Effect of transfer of documents on vendor's lien or right of stoppage *in transitu*.

Supplemental.

11. For the purposes of this Act, the transfer of a document may be by endorsement, or where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

Mode of transferring documents.

12.—(1) Nothing in this Act shall authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

Saving for rights of true owner.

(2) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged, any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent.

13. The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act.

Saving for common law powers of agent.

14. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act, but this repeal shall not affect any right acquired or liability incurred before the commencement of this Act under any enactment hereby repealed.

Repeal.

15. This Act shall commence and come into operation on the first day of January, one thousand eight hundred and ninety.

Commencement.

16. This Act shall not extend to Scotland.

Extent of Act.

17. This Act may be cited as the Factors Act, 1889.

Short title.

SCHEDULE.

Section 14.

ENACTMENTS REPEALED.

Session and Chapter.	Title.	Extent of Appeal.
4 Geo. 4, c. 83.	An Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandizes entrusted to factors or agents.	The whole Act
6 Geo. 4, c. 94.	An Act to alter and amend an Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandize entrusted to factors or agents.	The whole Act.
5 & 6 Vict. c. 39.	An Act to amend the law relating to advances <i>bond fide</i> made to agents entrusted with goods.	The whole Act.
40 & 41 Vict. c. 39.	An Act to amend the Factors Acts.	The whole Act.

SALE OF GOODS ACT, 1893 (56 & 57 VICT. c. 71).

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SCHEDULE.

An Act for codifying the Law relating to the Sale of Goods.
[20th February, 1894.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

PART I.

FORMATION OF THE CONTRACT.

Contract of Sale.

Sale and
agreement to
sell.

1.—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. Capacity to buy and sell.

Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

Formalities of the Contract.

3. Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties. Contract of sale, how made.

Provided that nothing in this section shall affect the law relating to corporations.

4.—(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf. Contract of sale for ten pounds and upwards.

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4) The provisions of this section do not apply to Scotland.

Subject-matter of Contract.

5.—(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller Existing or future goods.

after the making of the contract of sale, in this Act called "future goods."

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

Goods which have perished.

6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

Goods perishing before sale but after agreement to sell.

7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

The Price.

Ascertainment of price.

8.—(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Agreement to sell at valuation.

9.—(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Conditions and Warranties.

Stipulations as to time.

10.—(1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2) In a contract of sale "month" means *prima facie* calendar month.

When condition to be treated as warranty.

11.—(1) In England or Ireland—

(a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(b) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the

contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract :

- (c) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

12.—In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

Implied undertaking as to title, &c.

- (1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass :
- (2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods :
- (3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description ; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Sale by description.

14. Subject to the provisions of this Act, and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows :—

Implied conditions as to quality or fitness.

- (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably

fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose :

- (2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality ; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed :
- (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade :
- (4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Sale by Sample.

Sale by
sample.

15.—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample—

- (a) There is an implied condition that the bulk shall correspond with the sample in quality ;
- (b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample :
- (c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

PART II.

EFFECTS OF THE CONTRACT.

Transfer of Property as between Seller and Buyer.

Goods must be
ascertained.

16. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Property
passes when
intended to
pass.

17.—(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Rules for
ascertaining
intention.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property

in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval or “on sale or return” or other similar terms the property therein passes to the buyer :—

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5.—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made :

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodian (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

19.—(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

Reservation
of right of
disposal.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the

price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

Risk *prima facie* passes with property.

20. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party.

Transfer of Title.

Sale by person not the owner.

21.—(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Provided also that nothing in this Act shall affect—

(a) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(b) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Market overt.

22.—(1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2) Nothing in this section shall affect the law relating to the sale of horses.

(3) The provisions of this section do not apply to Scotland.

Sale under voidable title.

23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Revesting of property in stolen goods on conviction of offender.

24.—(1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means

not amounting to larceny, the property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3) The provisions of this section do not apply to Scotland.

25.—(1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

Seller or
buyer in
possession
after sale.

(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

26.—(1) A writ of *fiery facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof, the hour, day, month, and year when he received the same.

Effect of
writs of
execution.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(3) The provisions of this section do not apply to Scotland.

PART III.

PERFORMANCE OF THE CONTRACT.

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Duties of
seller and
buyer.

Payment and delivery are concurrent conditions.

28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price; and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Rules as to delivery.

29.—(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

Delivery of wrong quantity.

30.—(1) Where the seller delivers to the buyer a quantity or goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

Instalment deliveries.

31.—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one

or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

32.—(1) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer. Delivery to carrier.

(2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

33. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit. Risk where goods are delivered at distant place.

34.—(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. Buyer's right of examining the goods.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. Acceptance.

36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is Buyer not bound to return rejected goods.

sufficient if he intimates to the seller that he refuses to accept them.

Liability of
buyer for
neglecting
or refusing
delivery of
goods.

37. When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

Unpaid seller
defined.

38.—(1) The seller of goods is deemed to be an “unpaid seller” within the meaning of this Act—

(a) When the whole of the price has not been paid or tendered;

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this part of this Act the term “seller” includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

Unpaid
seller's rights.

39.—(1) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(a) A lien on the goods or right to retain them for the price while he is in possession of them;

(b) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them;

(c) A right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

Attachment
by seller in
Scotland.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or pouding; and such arrestment or pouding shall have the same operation and effect in a competition or otherwise as an arrestment or pouding by a third party.

Unpaid Seller's Lien.

Seller's lien.

41.—(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain

possession of them until payment or tender of the price in the following cases, namely :—

- (a) Where the goods have been sold without any stipulation as to credit ;
 - (b) Where the goods have been sold on credit, but the term of credit has expired ;
 - (c) Where the buyer becomes insolvent.
- (2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention. Part delivery.

43.—(1) The unpaid seller of goods loses his lien or right of retention thereon— Termination of lien.

- (a) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods ;
 - (b) When the buyer or his agent lawfully obtains possession of the goods ;
 - (c) By waiver thereof.
- (2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in transitu.

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price. Right of stoppage *in transitu*.

45.—(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier. Duration of transit.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them,

the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

How stoppage
in transitu
is effected.

46.—(1) The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

Re-sale by Buyer or Seller.

Effect of sub-
sale or pledge
by buyer.

47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee.

Sale not
generally
rescinded by
lien or
stoppage *in
transitu*.

48.—(1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*.

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

49.—(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods. Action for price.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50.—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. Damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Remedies of the Buyer.

51.—(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. Damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in

question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Specific performance.

52. In any action for breach of contract to deliver specific or ascertained goods the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the Court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

Remedy for breach of warranty.

53.—(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for the breach of warranty,

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

Interest and special damages.

54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI.

SUPPLEMENTARY.

Exclusion of implied terms and conditions.

55. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

56. Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact. Reasonable time a question of fact.

57. Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action. Rights, &c. enforceable by action.

58. In the case of a sale by auction— Auction sales.

(1) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale :

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid :

(3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bind himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person : Any sale contravening this rule may be treated as fraudulent by the buyer :

(4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

59. In Scotland where a buyer has elected to accept goods which he might have rejected and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the Court before which the action depends, to consign or pay into Court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof. Payment into court in Scotland when breach of warranty alleged.

60. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned. Repeal.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

61.—(1) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained. Savings.

(2) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any

enactment relating to the sale of goods which is not expressly repealed by this Act.

(4) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

Interpreta-
tion of terms.

62.—(1) In this Act, unless the context or subject-matter otherwise requires,—

“Action” includes counterclaim and set off, and in Scotland condensation and claim and compensation :

“Bailee” in Scotland includes custodier :

“Buyer” means a person who buys or agrees to buy goods :

“Contract of sale” includes an agreement to sell as well as a sale :

“Defendant” includes in Scotland defender, respondent, and claimant in a multiple pinding :

“Delivery” means voluntary transfer of possession from one person to another :

“Document of title to goods” has the same meaning as it has in the Factors Acts :

“Factors Acts” mean the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same ;

“Fault” means wrongful act or default :

“Future goods” mean goods to be manufactured or acquired by the seller after the making of the contract of sale :

“Goods” include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale :

“Lien” in Scotland includes right of retention :

“Plaintiff” includes pursuer, complainer, claimant in a multiple-pinding and defendant or defender counter-claiming :

“Property” means the general property in goods, and not merely a special property :

“Quality of goods” includes their state or condition :

“Sale” includes a bargain and sale as well as a sale and delivery :

“Seller” means a person who sells or agrees to sell goods :

“Specific goods” mean goods identified and agreed upon at the time a contract of sale is made :

“Warranty” as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

52 & 53 Vict.
c. 45.
53 & 54 Vict.
c. 40.

(2) A thing is deemed to be done "in good faith" within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(8) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4) Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

63. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four. Commence-
ment.

64. This Act may be cited as the Sale of Goods Act, 1898. Short title.

SCHEDULE.

Section 60.

This schedule is to be read as referring to the revised edition of the statutes prepared under the direction of the Statute Law Committee.

ENACTMENTS REPEALED.

Session and Chapter.	Title of Act and Extent of Repeal.
1 Jac. 1, c. 21 -	An Act against brokers. The whole Act.
29 Car. 2, c. 3 -	An Act for the prevention of frauds and perjuries. In part; that is to say, sections fifteen and sixteen.*
9 Geo. 4, c. 14 -	An Act for rendering a written memorandum necessary to the validity of certain premises and engagements. In part; that is to say, section seven.
19 & 20 Vict. c. 60 -	The Mercantile Law Amendment (Scotland) Act, 1856. In part; that is to say, sections one, two, three, four, and five.
19 & 20 Vict. c. 97 -	The Mercantile Law Amendment Act, 1856. In part; that is to say, sections one and two.

* Commonly cited as sections sixteen and seventeen.

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1. The first part of the document is a list of the names of the persons who have been appointed to the various offices of the government.

2.

3.

